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In the

Supreme Court of the United States

OCTOBER TERM, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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133 pp

QUESTIONS PRESENTED

This case involves an unprecedented use of the collateral estoppel doctrine to frustrate and avoid this Court's jurisdiction to review the merits of a major First Amendment claim involving free expression exercised by over 100 video stores, cabarets and theaters in New York City. The case stems from an ordinance that regulates the zoning of "adult establishments" throughout the five boroughs of New York City. A federal district court issued a *Pullman* abstention order that retained federal jurisdiction over the First Amendment claims pending a remand to New York state courts for a determination of the state constitutional free speech claims. When those claims were rejected by the state courts, the federal district court refused to review the Petitioners' distinct First Amendment claims based upon collateral estoppel. Thus, the Petitioners' First Amendment claims are now ready for disposition by the federal district court, but for the following QUESTIONS PRESENTED:

1. Whether the federal full faith and credit statute, 28 U.S.C. § 1738, precludes a party from litigating in federal court a First Amendment claim involving free expression where that court had previously entered a *Pullman* abstention order that (a) retained federal jurisdiction over the First Amendment claim pending (b) a remand to state courts to exercise their jurisdiction over similar free speech claims under the state constitution, and where an *England* reservation of federal issues was filed?

2. Whether the federal full faith and credit statute precludes a party from litigating a First Amendment claim involving free expression in a federal court where the state courts, following a *Pullman* remand order, had rejected free speech claims under the state constitution by addressing the "same issues" and applying the "same standards" as would be applicable to the First Amendment claim?

3. Whether the Second Circuit's use of the collateral estoppel doctrine makes it impossible for First Amendment claimants to urge that federal free speech standards be changed or reconsidered?

4. Whether the radical requirement that 84% of all pre-existing adult businesses must either close or relocate to remote areas of the City violates the First Amendment because such a large scale suppression of free speech is in direct conflict with *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62 n. 35 (1976)?

STATEMENT PURSUANT TO RULE 29.6 AND LIST OF PARTIES

Petitioners, who were the Appellants in the proceedings before the Second Circuit, represent approximately 100 operators of video stores, theaters and other businesses, that provide various forms of adult entertainment to the public in all five boroughs of New York City. None of the corporate Petitioners has any parent companies or nonwholly owned subsidiaries that need to be listed pursuant to Rule 29.6.

The Petitioners are:

Amsterdam Video Inc.
A & X Entertainment Inc., d/b/a Playpen II
Adult Video, Inc.
Ascot Space Amusement, Inc., d/b/a Ascot Theatre
Big Apple Cinemas Inc., d/b/a Show Follies Theater
Brett Distributors, Inc., d/b/a Media Distributors
Capri Cinema Inc.
Capwell Entertainment, Inc., d/b/a Legz Diamond's Playhouse
Church Street Café Inc., d/b/a Baby Doll Lounge
College Pt. Rest. Corp., d/b/a Gallagher's II
Crazy Fantasy Video, Inc.
Cupid's Treasures, Inc., d/b/a Banana Video and Unicorn
Dara Distributors Inc., d/b/a Love Shack
Desire Video Inc.
E & A Books, Inc.
E & A Video and Magazine Inc.
Ed-Mart Bar & Grill Inc., d/b/a Penny Whistle
For The People Theatres of N.Y., Inc., d/b/a Fair Theatre
Four Keys Enterprises, Inc., d/b/a Hollywood Peepshows
Fourteenth St. Enterprises Inc., d/b/a All Male Adult Video
Fun City Video Corp.
G & D Merchandise Corp., d/b/a Peepland
Gotham Exhibitor Inc., d/b/a Peep O Rama
Helen Wolff Ltd., d/b/a Come Again
I.S. Sultars Inc.
J & J Tummy Yummies Corp., d/b/a Naked City
JGJ Merchandise Corp., d/b/a Peepland/Valentina's II

JHM Video Corp.
JUM Operating Corp., d/b/a Peepland
JVR Video Center Inc., d/b/a Playground
Kinematics Merchandising & Distributors, Inc.,
d/b/a Kinematics
Kisma Video, Inc.
L &T Video, Inc., d/b/a Badlands Adult Video
Madeline D'Anthony Ent. Inc., d/b/a Harmony Theatre
Manhattan Video, Inc.
Marquis Video Inc., d/b/a Marquis Video
Mirage Productions Inc. d/b/a Love Shack
Montana Holdings Inc., d/b/a Runway 69
Nawan Entertainment Inc., d/b/a Euro World
Nilupul Video Inc.
N.R.S. Video Inc.
NY Video Inc., d/b/a Love Shack
Pabon Theatre Corp., d/b/a Eros Theatre
Peregrine Enterprises, Inc., d/b/a Paradise Club
R.E.J.M., Inc., d/b/a Big Top Lounge
Ron Bob Pub Inc., d/b/a Gallagher's
Sami's Video Warehouse Inc.,
d/b/a Warehouse on the Block Ltd.
Serendib Video Inc., d/b/a Serendib Video
SPH Video Corp.
Star Distributors, Ltd.
Statewide Video Inc.
Steam Heat Inc.
STS Video Inc., d/b/a Adult Video
Suemar Video, Inc., d/b/a Goodtime Video
Third Avenue Entertainment Inc., d/b/a XXX Video
Thunder Video Inc.
Town Video Sales, Inc., d/b/a Les Hommes Book Shop
Video, Video, Video Inc.
Video 30 Of Queens Inc., d/b/a ECSXXXTASY Video
West Video Inc.
Zideo Video Inc.
21 Ann Street Corp.,
d/b/a Ann Street Adult Entertainment Center
130 C Street Corp., d/b/a Christopher Street Book Shop

155 Video Center Corp., d/b/a Peepworld
300 Book Center
303 W. 42nd Street Enterprises Inc., d/b/a Show World
320 W. 45th St. Rest. Corp., d/b/a Private Eyes
323 Canal St. Inc.
35-30 38th St. Corp., d/b/a Cityscape
412 8th Ave. Corp., d/b/a Nude York City
45-08 Vernon Blvd. Corp. d/b/a Riverhead Inn
603 Video Inc.
610 Video Store Inc.
691 Video Center Corp.
691 8th Ave. Corp.
693 Video Corp., d/b/a TNL Video
711 Associates Ltd., d/b/a Peepland
729 6th Avenue Corp., d/b/a Billy's Topless
733A Corp., d/b/a Video Palace
763 Video Store Inc.
777-779 8th Ave. Corp., d/b/a Hollywood Twin and
81-22 Baxter Av. Lounge Inc., d/b/a Ilda's Place II

The Respondents, who were appellees and intervenors before the Second Circuit, are:

The City of New York
Hon. Rudolph W. Giuliani, as Mayor of the City of New York
Joseph B. Rose, as Director of City Planning,
Department of City Planning of the City of New York,
Gaston Silva, as Commissioner of Buildings,
Department of Buildings of the City of New York
Times Square Business Improvement District
Center For The Community Interest
Bellaire/Bell-Vill Civic Association
Bnos Israel Girls' School
Bowne Park Civic Association
Briarwood Community Association
Bronx Community Board #12
Brooklyn Civil Council
Brooklyn Tenants Council
Cardinal Spellman High School
Coalition of United Residents for a Safer Environment

College Point Board of Trade
Committee for a Better and Safer Nostrand Avenue
Communities of Masbeth and Elmhurst Together
Community School District 21 Presidents' Council
Congregation Bnai Shloima Zalman
Crown Heights Taxpayers and Civic Association
Douglaston Civic Association
East Midwood Neighborhood Association
Councilmember Andrew Eristoff
Grand Central Partnership
Holliswood Civic Association
Hudde Junior High School Parents Association
Jackson Heights Community Development Corporation
Kings Highway District Management Association
Kingsway Jewish Center
Lawyers' Committee on Violence
Manhattan Terrace Civic Associaiton
Councilmember Helen Marshall
Midwood Civic Action Council
New Northern Boulevard Business Association
Northern Boulevard Merchants' Association
100-299 East 77th Street Block Association
Prospect Park Yeshiva
Queens Braddock Civic Association
Queens Village Civic Association
Real Estate Board of New York
Residents Against Street Prostitution
Rosedale Block Association
Rosedale Civic Association
Councilmember John Sabini
34th Street Partnership
United Civic Council of Queens
United Community Civic Association
Councilmember Anthony Weiner
West 45th Street Block Association
West 47th/West 48th Street Block Association and
West 90's/West 100's Neighborhood Coalition

Defendant Gaston Silva has succeeded, and been substituted for, Joel A. Miele, Sr., as the Commissioner of Buildings. The American Alliance for Rights and Responsibilities, a defendant-intervenor, has changed its name to the Center for the Community Interest.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6 and List of Parties	iii
Table of Authorities	xi
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	5
Reasons for Granting the Writ	15
1. The Second Circuit's use of collateral estoppel to override federal jurisdictional and abstention doctrines poses critical problems in the administration of "Our Judicial Federalism."	15
2. The Second Circuit's decision raises critical problems as to the procedural "rights" of First Amendment free speech claimants	21
3. The Second Circuit's use of the collateral estoppel doctrine makes it impossible for First Amendment claimants to urge that federal free speech standards be changed or reconsidered	23
4. The radical requirement that 84% of all pre-existing adult businesses must either close or relocate to remote areas of the City violates the First Amendment because such a large scale suppression of free speech is in direct conflict with *Young v. American Mini Theaters, Inc.*	26
Conclusion	28

APPENDICES

Order denying a petition for rehearing and rehearing in banc, dated July 13, 1998, is reprinted at (A-1).

Judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on June 3, 1998, and reported at 146 F.3d 99 (2d Cir. 1998), is reprinted at (A-3).

Order of the United States Court of Appeals for the Second Circuit, entered on March 17, 1998, granting stay pending appeal, is reprinted at (A-30).

Judgment and opinion of the United States District Court for the Southern District of New York (Cedarbaum, J.), dated March 6, 1998, and reported at 997 F. Supp. 418 (S.D.N.Y. 1998), sub nom. *Hickerson v. City of New York*, is reprinted at (A-33).

Judgment and opinion of the New York Appeals dated February 24, 1998, sub nom. *Stringfellow's of New York, Ltd. v. City of New York*, and reported at 91 N.Y.2d 382 and 671 N.Y.S.2d 406 (1998), is reprinted at (A-45).

Judgment and opinion of the United States District Court for the Southern District of New York, dated June 27, 1996, and reported at 932 F. Supp. 550 (S.D.N.Y. 1996), is reprinted at (A-68).

Copies of color photographs of alternative areas proposed by the City of New York where Petitioners could relocate, (A-87).

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry,
449 U.S. 90 (1980) 20

Bose Corp. v. Consumers Union,
466 U.S. 485 (1984) 22

Bradley v. Pittsburgh Bd. of Educ.,
913 F.2d 1064 (3d Cir. 1990) 21

Cullen v. Margiotta,
811 F.2d 698, 732 (2d Cir. 1987) 19

England v. Louisiana State Board of Medical Examiners,
375 U.S. 411 (1964) 8

Examining Board v. Flores de Otero,
426 U.S. 572 (1976) 19

Fields v. Sarasota Manatee Airport Auth.,
953 F.2d 1299 (11th Cir. 1992) 21

Hawaii Housing Authority v. Midkiff,
467 U.S. 229 (1984) 19

Hickerson v. City of New York,
932 F. Supp. 550 (S.D.N.Y. 1996) 2

Hickerson v. City of New York,
997 F. Supp. 418 (S.D.N.Y. 1998) 1

Instructional Systems, Inc. v. Computer Curriculum Corp.,
35 F.3d 813 (3d Cir. 1994) 21

Michigan v. Long,
463 U.S. 1032 (1983) 20

	Page
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)	22
Montana v. United States, 440 U.S. 147 (1979)	15, 22, 24
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	21
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	22
Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941)	7, 13, 16
Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	11, 23, 27
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)	26
Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993)	24
Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976)	26, 27

STATUTES

28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	7
28 U.S.C. § 1367	7
28 U.S.C. § 1447(c)	7

	Page
28 U.S.C. § 1738	3, 12, 15
N.Y. Const. art. I, § 8	3
U.S. Const. amend. I	3

MISCELLANEOUS

Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.CAR. L.REV. 1803 (1992)	24
Justice Jackson, *Full Faith and Credit -- The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1 (1945)	16
18 MOORE'S FEDERAL PRACTICE (3d ed. 1998)	20
Justice O'Connor, *Our Judicial Federalism*, 35 CASE WESTERN RESERVE L. REV. 1 (1984)	15
Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942)	17
STERN, GRESSMAN, SHAPIRO AND GELLER, SUPREME COURT PRACTICE, (7th ed. 1993)	20
WRIGHT, LAW OF FEDERAL COURTS (5th ed. 1994)	19

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Amsterdam Video, Inc., et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in the above-captioned proceeding.

Opinions Below

The opinion of the Second Circuit, rendered on June 3, 1998, is reported at 146 F.3d 99 (2d Cir. 1998). It is reprinted in the Appendix at A-3.

The opinion of the United States District Court for the Southern District of New York (Cedarbaum, J.), dated March 6, 1998, is reported at 997 F. Supp. 418 (S.D.N.Y.

1998), sub nom. *Hickerson v. City of New York*. It is reprinted in the Appendix at A-33. An earlier opinion of that court, dated June 27, 1996, is reported at 932 F. Supp. 550 (S.D.N.Y. 1996), and is reprinted in the Appendix at A-68.

The opinion of the New York Court of Appeals in this proceeding, sub nom. *Stringfellow's of New York, Ltd. v. City of New York*, is reported at 91 N.Y.2d 382 and 671 N.Y.S.2d 406 (1998). It is reprinted in the Appendix at A-45.

Jurisdiction

The Second Circuit issued its judgment and opinion on June 3, 1998. Petitioners filed a timely petition for rehearing, together with a suggestion for rehearing en banc. The Second Circuit denied both the petition and the suggestion on July 13, 1998. A copy of that order is reprinted in the Appendix at A-1. This Petition is being filed within 90 days of the rehearing denial order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Second Circuit, on July 17, 1998, denied Petitioners' motion to stay issuance of its mandate pending the filing of this Petition and final action by this Court thereon. On July 22, 1998, Justice Ginsburg denied a motion to stay the issuance of the Second Circuit's mandate pending certiorari proceedings. Thereafter, Petitioners requested that this motion be resubmitted to Justice Stevens, who then referred the motion to the entire Court. On July 28, 1998, the Court denied the motion for a stay.[1]

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[1] This may be one of the most highly publicized and important cases to reach this Court in recent years. Its progress through the state and federal systems has attained national interest – being reported in major newspapers throughout the United States including the LOS ANGELES TIMES, INDIANAPOLIS STAR, DALLAS MORNING NEWS, CHICAGO TRIBUNE, BOSTON GLOBE, PITTSBURGH POST-GAZETTE, ORLANDO SENTINEL, BUFFALO NEWS and WASHINGTON POST. Articles concerning this case appeared in the NEW YORK TIMES on no fewer than twenty occasions. *(Footnote Continued on Following Page)*

Constitutional and Statutory Provisions Involved

United States Constitution, First Amendment:

Congress shall make no law... abridging the freedom of speech...

New York State Constitution, Article I, § 8:

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press.

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit:

The records and judicial proceedings of any court of any such State, Territory or Possession ...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Text Amendment N 950384 ZRY to New York City Zoning Resolutions (adopted October 25, 1995):

The Zoning Resolution first defines the term "Adult Establishment" (§ 12-10). An Adult Establishment is a commercial establishment where a "substantial portion" of the floor area accessible to customers is allocated to, or stock-in-trade is characterized by, an emphasis on "specified sexual activities" or "specified anatomical areas," or a business that "regularly features" films or live performances

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Even Justice Stevens' decision to present the Petitioners' stay application to the entire Court received prominent coverage in numerous papers.

depicting an emphasis on "specified sexual activities" or "specified anatomical areas."

After consigning Adult Establishments to districts that are, for the most part, distinct from the major and secondary shopping centers and retail areas, as well as heavy manufacturing districts, the Ordinance imposes the following location limitations within the few remaining available districts:

(a) Adult Establishments must be located at least 500 feet from a church, school, residential district, or certain commercial and manufacturing districts (§§ 32-01(b), 42-01(b));

(b) Adult Establishments must be located at least 500 feet from another Adult Establishment (§§ 32-01(c), 42-01(c));

(c) Only one Adult Establishment can be located on a zoning lot (§§ 32-01(d), 42-01(d));

(d) Adult Establishments may not exceed 10,000 square feet of floor area and cellar space (§§ 32-01(e), 42-01(e)).

Statement of the Case

This case involves an unprecedented use of the doctrine of collateral estoppel (or issue preclusion) to frustrate and avoid this Court's jurisdiction to review the merits of an important First Amendment free speech claim.

A. The initial filings in the state trial court

1. The event that ignited this important litigation and started Petitioners on the long and arduous journey to this Court occurred on October 25, 1995, when the City of New York enacted an Amendment to its Zoning Resolution (Text Amendment N 950384 ZRY). The Amendment forced the relocation and disbursement of "adult establishments," defined as sexually oriented businesses. In the words of the Second Circuit, the principal provisions of the Amendment was to "limit the permissible locations of adult establishments to non-residential districts and require that they be located within the districts in which they are permitted – at least 500 feet away from any school, day care center, or houses of worship; at least 500 feet from excluded districts; and at least 500 feet from one another." (A-7-8).

2. Prior to November 1994, the Zoning Resolutions of the City of New York made no distinction between adult uses and other commercial uses that did not have an "adult character". While the City regulated several general classes of commercial establishments under its Zoning Resolution, adult-oriented businesses had never been differentiated from other commercial uses (J.A. 215).[2] In the past, adult bookstores and theaters have been allowed to exist in each of the commercial districts where other retail businesses,

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[2] Numbers preceded by "J.A." refer to pages of the consolidated Appendix filed in the Second Circuit. *Amsterdam Video, Inc. v. City of New York*, Dkt. No. 98-7270, and *Rachel Hickerson v. City of New York*, Dkt. No. 98-7269.

including bars and taverns, have been permitted to operate – and where the latter are still permitted to operate. For decades, adult establishments have successfully coexisted with other businesses without prejudice or detriment to each other (J.A. 215, 814-15). Many of these adult establishments have operated at their current locations for more than 20 years without incident (J.A. 215).

3. In 1995, at the time of the enactment of the Amendment, there were at least 177 adult businesses in the City. Under the Amendment, only about 28 of those establishments (about 16% of the total) will be permitted to remain in their present locations. The remaining establishments will be forced to close, change the nature of their businesses, or relocate to remote areas of the City.

4. The Amended Zoning Resolution relegates adult establishments to certain limited zones within the City and effectively bars the continued operation of an existing adult establishment within the primary commercial districts, which are most suitable for retail stores in local and convenient areas. Under the Amended Zoning Resolution, adult establishments are now consigned to districts that are, for the most part, distinct from the major and secondary shopping centers and retail areas, and include heavy manufacturing districts (J.A. 219).

5. On February 27, 1996, more than one hundred adult videostores, theaters and cabarets joined forces and commenced an action in the New York State Supreme Court to have the Zoning Resolution declared unconstitutional.[3] The suit, that sought both declaratory and injunctive relief,

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[3] Simultaneously, four patrons of these establishments filed a similar suit in that state court, *Hickerson, et al. v. City of New York, et al.* Later in 1996, a similar suit was filed by one adult establishment, *Stringfellow's Ltd. v. City of New York, et al.* All three actions challenged the constitutionality of the zoning ordinance. The cases were administratively, although not formally, consolidated for hearing and appeal in the New York court system.

alleged that the Zoning Resolution violated both the state and federal Constitutions. Thirteen of the Petitioners' causes of action were brought under the New York State Constitution. In addition, the fourteenth cause of action alleged that the Zoning Resolution violated Petitioners' rights to free expression and equal protection guaranteed by the First and Fourteenth Amendments to the United States Constitution (J.A. 20-118).

B. The transfer of the case to the federal court

6. New York City immediately removed Petitioners to federal court in the Southern District of New York. The City asserted (a) that the federal court "has original jurisdiction over the claims arising under the United States Constitution pursuant to 28 U.S.C. § 1331," and (b) that the federal court also "has supplemental jurisdiction over the claims arising under the New York State Constitution pursuant to 28 U.S.C. § 1367" (J.A. 18). Shortly thereafter, the City and the other Respondents filed, in the federal Court, answers to the *Amsterdam* complaint (J.A. 143). Issue had never been joined in the state court.

C. The *Pullman* remand to the state courts

7. In April of 1996, Petitioners sought an order from the Southern District (pursuant to 28 U.S.C. § 1447(c)) remanding the entire action to the state court, from whence the case had been removed (J.A. 209). Petitioners argued that because the case involves many difficult and unresolved questions of state law, any court hearing the dispute will have to address a great deal of interrelated state issues prior to reaching the federal issues in the case (J.A. 228).

8. In June of 1996, the district court, abstaining under *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), remanded all state claims to the state court, but retained jurisdiction over the federal cause of action pending

determination of the state claims in the New York courts (J.A. 276). The district court held that the claims made under the state constitution do "*not diminish* the importance of the federal constitutional issues" (A-84).[4]

9. While Petitioners initially opposed the federal court's retention of jurisdiction over the First Amendment claims, they quickly accepted the jurisdictional consequences of the *Pullman* order. Immediately upon the remand of the state issues to the state court, Petitioners' counsel filed a Reservation of Federal Issues, as suggested by this court in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1964), advising the state court that they,

> ... expressly reserve their right to litigate the causes of action asserted in this action arising under the First and Fourteenth Amendments to the Constitution of the United States of America in the federal court system, and submit only those causes of action arising under the New York State Constitution for litigation in the New York State court system (J.A. 309-310).

D. Pursuing the state claims in the state courts

10. During the ensuing state court proceedings, which ranged from the trial court all the way to the New York Court of Appeals, the jurisdictional limitations set by the district court's *Pullman* abstention order were respected.[5] Moreover, following this Court's admonitions in *England*, Petitioners strictly refrained from submitting their First Amendment claims to the state courts in order to preserve their right to litigate them, if necessary, in federal court. In other words, in

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[4] The court also recognized that the language of the First Amendment to the United States Constitution and the text of Article I, § 8 of the New York Constitution are different (J.A. 289).

[5] Petitioners' First Amendment claims, the district court wrote, simply cannot be considered "matters in which state law predominates." (A-84).

light of the district court's retention of their federal cause of action, Petitioners chose not to assert any federal claims in the state proceeding. Their challenge to the Zoning Resolution rested, solely and exclusively, on the state constitution.

11. The state courts fully understood that their jurisdiction, following the remand from the federal court, extended only to the claims made under the New York State constitution. They recognized that the state courts no longer had any jurisdiction to resolve the federal First Amendment claims. In the words of the New York Court of Appeals, the federal district court had "remanded [to the state courts] plaintiffs' causes of action grounded in the State Constitution, retaining jurisdiction over the Federal claims" (A-52).[6]

12. The state trial court, exercising its remanded jurisdiction over the state constitutional claims, was confronted with a "voluminous record of pleadings, affidavits, exhibits and briefs totaling more than 10,000 pages." (A-52). Most of the City's affidavits and exhibits were fiercely contested by Petitioners, but the court refused to permit them to submit reply affidavits and exhibits. The court conducted no trial or hearing to resolve the conflicting affidavits, leaving unresolved many factual disputes. No judicial findings of fact were ever made. Instead, the court granted the City's motion for summary judgment, while denying Petitioners' counter motion. And by accepting the City's version of the contested facts, the court concluded that "the Amended Zoning Resolution does not violate plaintiffs' rights of freedom of expression

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[6] The state trial court, the Supreme Court of New York County, also recognized that the federal court's *Pullman* order had remanded to the state courts only "that portion of the claims arising under the New York State Constitution, holding in abeyance the claims ... predicated on the Federal Constitution." *Stringfellow's of New York v. City of New York*, 653 N.Y.S.2d 801, 803 (Sup. Ct. N.Y. Co. 1996).

guaranteed under the State Constitution, and is, therefore, constitutional." 653 N.Y.S.2d at 814.

13. Petitioners appealed to the highest court of New York. The district court (A-39), summarized the New York Court of Appeals' opinion as follows:

> (a) The state constitutional standards governing the New York City ordinance in question "are substantially the same as the federal standards."
>
> (b) The New York Court of Appeals "relied on both state and federal authority to hold that the Amended Zoning Resolution had a purpose unrelated to speech, imposed restrictions no broader than necessary to implement the legitimate concerns of the legislature, and provided for reasonable alternative avenues of communication."
>
> (c) "Thus, after a thorough review of the record below, the Court of Appeals held that the resolution did not violate the state constitution and could be enforced by defendants."

14. The federal court also noted that the state trial court had found that the New York City ordinance "was not an attempt to regulate speech but rather was motivated by concerns other than those related to speech, and, in particular, by a reasonable belief that adult establishments produce undesirable secondary effects such as neighborhood deterioration, crime and decreased property values . . . and is no broader than is necessary to address the negative effects associated with adult establishments." (A-37).

E. The federal court imposes "collateral estoppel"

15. After Petitioners' state constitutional claims were rejected by the New York courts, they returned to the federal district court to litigate their First Amendment claims over which the district court had retained jurisdiction, under its

earlier *Pullman* order. Petitioners accordingly sought a preliminary injunction to stay enforcement of the Zoning Resolution pending the previously promised resolution of their First Amendment claims.

16. The district court denied the preliminary injunction, without a hearing, concluding that the Plaintiffs' federal claims were barred by collateral estoppel (A-43). The district court found that Petitioners have not shown a likelihood of success on the merits. Presumably, the "merits" referred to by the court were the merits of the First Amendment claim. But the "likelihood of success" was not to be measured, in the court's view, by reference to any independent examination of the First Amendment problem. Rather, the key to measuring "success," or the lack thereof, was found by the court to be within the parameters of the doctrine of collateral estoppel. Under that doctrine, the Petitioners were held to be precluded from litigating in the federal court "the same factual issues that have already been tried and decided in the state court." *Id.*

17. The district judge ruled that there was a complete identity of factual inquiries and standards to be applied in assessing the constitutionality of a "content-neutral zoning ordinance" under either the New York State Constitution or the First Amendment to the United States Constitution. The district judge pointed to this Court's ruling in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986), that "the appropriate inquiry" under the First Amendment is whether such a content-neutral zoning ordinance is (1) "designed to serve a substantial governmental interest," and (2) "allows for reasonable alternative avenues of communication." Both of those inquiries were held to be decisive in assessing the validity of the ordinance under the state constitution. Thus, the district judge concluded,

> Each of those inquiries was necessarily decided in the state court proceedings, and plaintiffs had a full and fair opportunity to litigate the issues in the state courts. Accordingly, if the doctrine applies, those

> issues are precluded from further litigation in this Court under the doctrine of collateral estoppel, now known as issue preclusion. (A-41).

The court also relied upon the federal full faith and credit statute, 28 U.S.C. § 1738, to support the use of the collateral estoppel doctrine to avoid adjudicating the Petitioners' significant First Amendment claims.

18. Finally, the court stated that the Petitioners had offered "no persuasive reason" to relitigate in federal court "the very same issues they litigated in the state courts in order to persuade this Court to reach a different factual result." (A-41). Even the *England*-type reservation of federal issues, that Petitioners had filed in the state court, was held inadequate to prohibit issue preclusion in this case. And why? Because it was claimed that *England* preserves the right to relitigate in federal court all the federal issues "only when the federal court is plaintiff's chosen forum, and plaintiff is forced, over its objection, to litigate those issues in state court" following the entry of a *Pullman* abstention order. But in this case, said the court, Petitioners' chosen forum at the beginning "was emphatically the state court" and, after the City had removed the case to federal court, Petitioners had "fought vigorously to return to their chosen forum, the state court." (A-41).

F. The Second Circuit affirms "collateral estoppel"

19. On the appeal from the district court's decision, the Second Circuit did not treat the case as an appeal from a studied denial of Petitioners' First Amendment claim. Rather, said the Second Circuit, "We review the district court's denial of a preliminary injunction for an abuse of discretion." (A-9). And, the court continued, any party seeking a preliminary injunction must establish not only irreparable injury but also (a) "a likelihood of success on the merits," and (b) "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Id.*

20. Using "abuse of discretion" as the appellate review standard, the Second Circuit concluded that the district court had not abused its discretion in denying the preliminary injunction. That is so, said the Second Circuit, because "we conclude that [Petitioners] are collaterally estopped from relitigating the issues that govern their First Amendment claim, they can show neither 'a likelihood of success on the merits' nor 'sufficiently serious questions going to the merits to make them fair ground for litigation." *Id.*

21. The critical assertion of the Second Circuit was that the issues decided and the standards applied by the New York state courts in rejecting Petitioners' state constitutional claims "are the same that would be applicable to [Petitioners] First Amendment claim." (A-11). Reference was made to the decision of the New York Court of Appeals in this proceeding that, for purposes of resolving the state constitutional free speech claims, the state courts had adopted and applied the First Amendment standards announced by this Court more than a decade ago in *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 49-50.[7]

22. Because of the perceived identity of the federal and state free speech standards, the Second Circuit held that Petitioners had "a full and fair opportunity to litigate these [federal] issues" in the course of litigating – in the state courts – the state constitutional claims. (A-22).

23. As to the *Pullman* abstention order, which had expressly reserved jurisdiction to consider the First Amendment free speech claim in the federal court, the Second Circuit simply held that the District Court did indeed exercise its retained jurisdiction. It did so by holding that

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[7] As indicated, in *Renton*, this Court established three standards or principles for determining whether an adult-establishment zoning ordinance complies with the free speech provision of the First Amendment: (1) The ordinance must be content neutral; (2) the ordinance must serve substantial governmental interests; and (3) the ordinance must leave open reasonable alternative avenues of communication.

Petitioners were collaterally estopped, under the federal full faith and credit statute, from relitigating the federal claim in the federal court.

24. With respect to the *England*-type Reservation of Federal Issues that Petitioners had filed in the state courts, the Second Circuit said that this Court has "appeared to suggest ... that an *England* reservation would only be available when the federal courts were a litigant's initial forum of choice." (A-23). Since Petitioners had originally filed both their federal and their state claims in the state courts, their "initial forum of choice" had to be the state courts, not the federal courts. Hence, the Second Circuit held that the *England* reservation was ineffective.

25. Finally, the Second Circuit abstained from discussing the jurisdictional consequences of the *Pullman* abstention order. Nor did the Second Circuit address the fact that the New York Court of Appeals decision, using federal standards to resolve the state constitution claims, could not have been reviewed by this Court. But, notably, as to the reviewability of its own collateral estoppel decision the court stated:

> [T]he district court made a determination of federal law – namely, that the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment. If the district court's interpretation of the governing First Amendment standards were mistaken, and if this Court were mistaken in affirming the district court's interpretation of federal law, the Supreme Court would remain free to so find and to order this case to proceed in district court. (A-29).

REASONS FOR GRANTING THE WRIT

The Second Circuit has superimposed the federal collateral estoppel doctrine (28 U.S.C. § 1738) on top of a federal *Pullman* abstention order, without regard for the First Amendment consequences. The results are conflict, confusion and unfairness in the administration and development of First Amendment free speech jurisprudence. As this Court warned in *Montana v. United States*, 440 U.S. 147, 163 (1979), "Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical."

1. The Second Circuit's use of collateral estoppel to override federal jurisdictional and abstention doctrines poses critical problems in the administration of "Our Judicial Federalism."

The odd feature of the Second Circuit's opinion is its failure to mention or discuss the jurisdictional consequences of the *Pullman* abstention order entered by the federal district court in this case. This becomes a blind application of the federal collateral estoppel doctrine, without regard to its jurisdictional underpinnings and requirements. This is such a serious departure from "the accepted and usual course of judicial proceedings" by a lower federal court as to call for "an exercise of this Court's supervisory power." Rule 10(a) of this Court's Rules.

a. The nature of a *Pullman* abstention order

Pullman abstention is an important part of "Our Judicial Federalism," defined as "a flexible and dynamic accommodation of the sometimes conflicting interests of the state and federal courts." Justice O'Connor, *Our Judicial Federalism*, 35 CASE WESTERN RESERVE L. REV. 1, 12 (1984). Stemming

from this Court's decision in *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), *Pullman* abstention mandates that a federal trial court (1) abstain from deciding a federal constitutional issue but (2) retain its federal jurisdiction over that issue until the parties have had an opportunity to obtain from the state courts a ruling on the state issues at stake. If the state courts reject the state claims, the case returns to federal court for decision on the federal claim. As a result, *Pullman* abstention accommodates the competing constitutional and jurisdictional interests of the federal and state courts. *See* WRIGHT, LAW OF FEDERAL COURTS, § 52, p. 324 (5th ed. 1994).

Thus, as in this case, the *Pullman* order can be viewed as a jurisdiction-dispensing device. The order retained federal jurisdiction over the First Amendment claim, and it remanded to the state courts their jurisdiction over state constitutional matters only. As a result, the state courts possessed no jurisdiction over the First Amendment claim. Consider, then, the following questions raised but not answered by the Second Circuit's preclusive treatment of the state court rulings:

b. The jurisdictional questions

First Question: Must the rulings that are to be given preclusive effect be those of a court possessing jurisdiction over the matters at issue?

An affirmative answer is obvious. As Justice Jackson once wrote: "Of course, if a tribunal has not jurisdiction to render a judgment valid by the tests of due process, it is without validity at home and is entitled to no credit abroad. To give conclusive effect to such a judgment would itself be a denial of due process." Justice Jackson, *Full Faith and*

Credit – The Lawyer's Clause of the Constitution, 45 COL. L. REV. 1, 8 (1945).[8]

By giving preclusive effect to the state courts' use or borrowing of the federal constitutional standards relative to this kind of zoning ordinance, the Second Circuit leaves unanswered the basic jurisdictional question. Where, in light of the *Pullman* order, did the state courts acquire any federal jurisdiction to address, let alone resolve, the First Amendment claim?

Given its silence on the matter, the Second Circuit must have assumed that the federal references in the opinions of the state courts somehow reinvested the state courts with jurisdiction to resolve the First Amendment issues. But that cannot be. Borrowing federal standards is not a jurisdictional event. Nor can such borrowing overrule the jurisdictional limitations expressed in the *Pullman* abstention order.

Indeed, upon the *Pullman* remand the Petitioners made doubly sure that the federal issues would not be addressed in the state courts. In their *England* reservation, Petitioners advised the state courts that they reserved the right to litigate their First Amendment claim "in the federal court system," and that they were submitting to the state court system "only those causes of action arising under the New York State Constitution" (J.A. 309-310).[9]

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[8] See also Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 18 (1942): "Where the court has no jurisdiction to determine the cause of action which is the subject of the suit, its judgment is void."

[9] The Second Circuit sought to deprecate the importance of the *England* reservation that Petitioners filed in the state court after the *Pullman* remand order. The court opined that such a reservation is available "only to litigants who have sought to proceed in federal court in the first instance, and not to litigants such as the instant [Petitioners] who chose to file suit in the state court." (A-25).

But filing or not filing an *England* reservation has nothing to do with the problem of whether the state courts had jurisdiction to resolve the

(Footnote Continued on Following Page)

The Second Circuit's opinion offers no answer to this critical jurisdictional question. But the question itself deserves plenary consideration by this Court, especially since it arises in the context of a First Amendment free speech claim. And without such a review by this Court, the careful balancing of federal and state judicial power embodied in the *Pullman* abstention doctrine may be permanently harmed.

Second Question: Can the First Amendment claimants be said to have had "a full and fair opportunity to litigate" the First Amendment issues in the state courts, which had no jurisdiction to resolve those issues?

The Second Circuit's answer is that the New York state courts' rejection of Petitioners' state constitutional claims, using the same facts, issues and analyses that would be utilized in resolving the federal claim, afforded Petitioners "a full and fair opportunity to litigate the [First Amendment] issues" in the state courts. (A-22). Therefore, says the Second Circuit, the federal estoppel doctrine "prevents a federal court from revisiting the same issues that were decided against [Petitioners] by the New York state courts." (A-9).

There are several problems created by that analysis. Where were the Petitioners or the Respondents given any fair notice that the First Amendment claim would be at issue in the state court proceedings following the *Pullman* order? The *Pullman* order itself announced that the case was being remanded to the state courts on the grounds that (1) the state constitutional free speech protections might be broader than

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First Amendment issue, especially for preclusive purposes. Such a reservation is not a jurisdictional event. It merely confirms what the *Pullman* order directed -- that only the state free speech issues were to be decided by the state courts. The *England* reservation merely advised the state courts that only the state issues would be addressed by Petitioners. Indeed, this Court's opinion in *England* stated that such an explicit reservation is not "indispensable" and that in no event can the litigant's "right to return" to the federal court be denied. *England*, at 421.

the First Amendment's protections, although that was "far from clear", and (2) the state courts should be given the first opportunity to construe any ambiguities in the new zoning ordinance. (A-77-78). But combined with its retention of federal jurisdiction over the First Amendment claim, the *Pullman* order cannot be a notification that the First Amendment issue would be on trial before the state courts.

Indeed, the whole notion that Petitioners had such "a full and fair opportunity" to litigate the federal issues in the state courts comes as an afterthought on the Second Circuit's part. Only after the state court litigation was ended did the federal courts belatedly discover that the state courts, in finding no violation of state free speech law, had used the same facts and standards as would be used in First Amendment analysis.

Here, of course, Petitioners vigorously contend that the issues are not identical "when the standards governing them are significantly different." *See Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir. 1987). Since the federal and state constitutional standards for judging a zoning ordinance that affects free speech differ, there is no identity of issues. Thus, collateral estoppel is inapplicable.

Part of the analytic problem here may lie in the fact that had the federal district court foreseen that the state free speech doctrine mirrors the First Amendment free speech doctrine, it would not have issued its *Pullman* abstention order. It is well settled that if "the state constitutional provision is the mirror of the federal one" abstention is inappropriate. WRIGHT, LAW OF FEDERAL COURTS, § 52 p. 325 (5th ed. 1994), citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n. 4 (1984); *Examining Board v. Flores de Otero*, 426 U.S. 572, 598 (1976).

In any event, this Court should clarify the meaning of the "full and fair opportunity" to litigate First Amendment issues in light of a *Pullman* abstention order. This Court has already recognized that: "Collateral estoppel does not apply where the party against whom an earlier court decision is asserted

did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Allen v. McCurry*, 449 U.S. 90, 101 (1980).

Third Question: Can a First Amendment free speech litigant be precluded from pursuing that federal claim in a federal court where the earlier state court reliance on, or borrowing of, the federal free speech standards is not appealable to this Court?

It is elementary preclusion law that "Relitigation of an issue is not precluded if the party against whom issue preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." 18 MOORE'S FEDERAL PRACTICE, § 132.03[4][k][i] (3d ed. 1998). And so we must ask, in this case, whether the decision of the New York Court of Appeals (the highest state court) could be subject to review by this Court on certiorari.

Even if we assume that the free speech provision of the New York State Constitution closely mirrors the First Amendment provision, which we dispute, it is difficult to read the New York decision as resting on anything other than adequate and independent state constitutional grounds. Cf. *Michigan v. Long*, 463 U.S. 1032 (1983). That conclusion is particularly compelling in view of the jurisdictional heritage of this case, wherein (1) the *Pullman* order had remanded only the state claims to the state courts, and (2) all parties and all the state courts proceeded on the assumption that only the state issues were on trial.

If the state court decision is truly based on state grounds, this Court would have no jurisdiction to review it. *See* STERN, GRESSMAN, SHAPIRO AND GELLER, SUPREME COURT PRACTICE, § 3.23, pp. 147-152 (7th ed. 1993). And to the extent that the state courts may have used or commented on the federal First Amendment standards in resolving the state issues, the jurisdictional inability of this Court to review such usage or comments further deprives these state court rulings

of preclusive effect. Certiorari should be granted to make that point clear.

2. The Second Circuit's decision raises critical problems as to the procedural "rights" of First Amendment free speech claimants.

By imposing the federal preclusion doctrine in this case, the Second Circuit has created serious problems in several procedural areas of First Amendment jurisprudence.

1. This Court has already established the "right" of First Amendment litigants "to return to the [Federal] District Court, after obtaining the authoritative state court construction for which the court abstained, for a final adjudication of [the federal] claim." *N.A.A.C.P. v. Button*, 371 U.S. 415, 427 (1963).

But the Second Circuit has effectively destroyed that "right" by holding that the state courts had already adjudicated the federal claim, unbeknownst to the parties or the state courts. The time is ripe for this Court to end such a "Catch-22" proposition. As some of the Circuits have recognized, the traditional rules of res judicata and collateral estoppel "do not apply to state court proceedings that follow *Pullman* abstention and an *England* reservation." *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 822 (3d Cir. 1994).[10] And the Ninth Circuit has observed that, following the entry of a *Pullman* order, it is "meaningless to retain [federal] jurisdiction just to rule at a

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[10] The Third Circuit cited the Eleventh Circuit decision in *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1302 n.1, 1306 (11th Cir. 1992) (*Pullman/England* situation is an exception to full faith and credit requirements). Also cited was the Third Circuit's own prior decision in *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1072 (3d Cir. 1990) (claim preclusion does not apply to state court proceedings when proper *England* reservation made).

later date that [the federal claimant] never had any right to return to federal court" to litigate the federal issues.

Such a Circuit conflict adds to the appropriateness of granting certiorari in this case.

2. Petitioners have also been deprived of the benefit of what this Court has described as an "obligation" of the federal courts to "make an independent examination of the whole record" in free speech cases to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984), quoting from *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964). As this Court added in *Montana v. United States*, 440 U.S. at 163, the abstention doctrine "may not serve as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions."

The question here is whether a federal court's agreement with a state court's summary judgment determination – that the ordinance does not violate a similar or identical state constitutional free speech provision – can do service for a federal court's obligation to make independent fact findings in a First Amendment free speech case. That question has never been answered by this Court, and must be answered.

What it all comes down to is this: is a federal court obliged to make its own independent factual determinations concerning what is protected by the First Amendment. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Bose Corp. v. Consumers' Union of United States, Inc.*, 466 U.S. 485 (in cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record to ensure that the judgment does not constitute a forbidden infringement on free expression). Or, are federal courts bound by the findings of a state court where there is a plausible claim that the standards are significantly different?

3. The Second Circuit's use of the collateral estoppel doctrine makes it impossible for First Amendment claimants to urge that federal free speech standards be changed or reconsidered.

There is a great anomaly in this case. The state courts, in resolving the state constitutional claims, are said to have addressed the same issues and applied the same standards as those that would be dispositive under the First Amendment.[11] Those federal issues and those federal standards were created and developed by this Court in its 1986 decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41.

The anomaly lies in the fact that the Petitioners are now collaterally estopped from urging that any of the *Renton* standards be refined, or reconsidered, or changed in any degree in light of the unique facts of this case, or in light of any changing community mores. Obviously, the state courts' borrowing and adoption of federal free speech standards, in the course of resolving the state issues, did not make a proper venue for urging or effecting any changes in the *Renton* standards. Moreover, under the *Pullman* abstention order, the state courts had no jurisdiction even to consider any changes in the federal *Renton* standards. And when the case returned to the federal judiciary for resolution of the First Amendment claim, the response was to rubber-stamp the state court's use of the *Renton* standards in resolving the state claims.

The result is that the Petitioners had no opportunity in either the state or the federal courts to urge that any of the *Renton* standards be updated or changed or reinterpreted in any way with respect to their application to New York City, which is composed of five quite different counties. And, the state courts had no jurisdiction to consider such changes. The federal courts were precluded from considering such changes.

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[11] Petitioners vigorously contested this in the courts below.

The *Renton* standards are meant to operate in all parts of the nation, not just New York City or not just the City of Renton. And if state courts wish to borrow them in construing their own constitutional problems, they are free to do so. But perceived difficulties with a federal constitutional rule as it operates nationwide may lead to modification or abandonment. See Louis D. Bilionis, *On the Significance of Constitutional Spirit,* 70 N.CAR. L.REV. 1803, 1809 (1992). Such a modification must be done by a court whose judgment on such a constitutional rule change is ultimately subject to review by this Court. That cannot happen in this case. The state courts had no jurisdiction to consider such changes; and the federal courts are estopped from entertaining or effecting changes, or even considering compliance with existing rules.

Thus we have a prime example of what this Court feared might happen: "[An] unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues [that] could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana v. United States,* 440 U.S. at 163.

Nowhere is that kind of "frozen" doctrine more evident in this case than with respect to the critical *Renton* standard: that the zoning or rezoning of adult establishments must "allow[] for reasonable alternative avenues of communication." *Id.* at 50.

But as the Ninth Circuit has recognized, this Court "has not stated what sort of factors may be considered when deciding whether the relocation sites provided by a city are reasonable." *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993). The Ninth Circuit also recognized that some Circuits, in dealing with the "reasonableness" component of the *Renton* standard, have tried to draw a distinction between (1) "economically unsuitable land," and (2) "physically or practically unsuitable land." *Id.* But such a distinction has proved unworkable. That

led the Ninth Circuit to create a reasonableness standard in terms of whether it is unreasonable to believe that [a designated relocation site] would ever become available to any commercial enterprise." *Id.* at 1531.

The First Amendment problem here is to create a standard of reasonableness in light of the nature and accessibility of the designated relocation areas among the five boroughs of New York City. And any designated "alternative site" is reasonable only if the location is commercially viable as well as readily accessible to the public.

But the relocation areas designated by the City in the state court proceedings cannot be considered reasonable by any standard. Most of the proposed sites are located in remote and destitute areas of the City. We have attached to the Appendix, (A-87-91) photographs from each borough of relocation areas designated by the City as permissible for adult businesses. These representative photographs show, in shocking detail, how "unreasonable" the designated areas are for any kind of business, and how dangerous is the public access to such locations.

These pictures, together with more than fifty others introduced in the courts below, show dump sites of drums containing hazardous waste, oil tank fields, marshes and wetlands, unimproved and closed roads, unpassable sidewalks, walls of concrete boulders, flooded lots, recycling transfer stations, Department of Sanitation buildings, concrete plants, UPS complexes, city fire department buildings, U.S. Customs warehouses, and a parking lot for the New York Aquarium. Most of these sites are not readily accessible, even by subway or bus. And walking or driving to these remote spots would be hazardous in the extreme.

Out of such deserted areas, many of which are not for sale or rent, some federal court and ultimately this Court must determine whether New York City has met the

"reasonableness" part of the *Renton* constitutional standards. No decision of this Court has answered this problem.

4. The radical requirement that 84% of all pre-existing adult businesses must either close or relocate to remote areas of the City violates the First Amendment because such a large scale suppression of free speech is in direct conflict with *Young v. American Mini Theaters, Inc.*

Admissions by the City that there will be significantly fewer adult businesses once the Zoning Resolution is enforced have proven true since enforcement proceedings were commenced on July 22, 1998.[12] Criminal summonses have been issued to the owners of bookstores and approximately 30 establishments have already been subject to padlock proceedings.[13] There is a serious federal constitutional issue concerning the degree to which protected speech can be so *radically* eliminated to satisfy a city's zoning needs. The drastic, and unprecedented, elimination of 84% of a form of protected speech violates the First Amendment. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62 n. 35 (1976)(holding that a zoning ordinance cannot reduce the number of adult businesses); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71 (1981).

In the current case, admissions from Defendant Giuliani that the end result will be dramatically fewer adult businesses in the city demonstrate vividly that the total number of adult uses will drastically decline and the public will be denied access to constitutionally protected expression. This clearly violates the Petitioners' rights of free expression under the First Amendment.

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[12] Defendant Mayor Giuliani, at a press conference held on February 24, 1998, announced that: "the places [adult businesses] can relocate are *severely limited* ...[the Zoning Resolution] will reduce the number in the City to something like 20 or 30" (J.A. 914).

[13] CHRISTIAN SCIENCE MONITOR, Sept. 29, 1998 at 3 (21 of the businesses closed their doors and the City has tried to shutter another 29).

The current case is noticeably distinguishable from this Court's decisions in *Renton* and *Young*, in that neither of those cases addressed the issue of pre-existing businesses. In *Young*, *all* existing adult establishments were allowed to remain in place under a grandfather provision. There, the ordinance affected only new establishments entering the marketplace. As a consequence, the impact on free speech was minimal. In *Renton*, there were no adult establishments in the municipality at the time of the enactment of the zoning resolution. Thus, it had only a prospective effect. The resolution at issue, in contrast, will *eliminate* at least 84% of the adult entertainment industry in New York City and affect approximately 150 adult theaters and bookstores throughout the city.

The call to reconsider *Renton* from both members of this Court, other circuit courts and scholars continues unabated. The need for the amplification of the guidelines for "alternative avenues of communication" counsels against further delay and this case is an excellent vehicle for such a reexamination. Thus, the inherent importance of the questions presented by this petition, combined with the substantial impact the answers will have on the exercise of free speech warrants a full review of the case by the Court.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States
Court of Appeals Filed
July 13 1998
Carolyn Clark Campbell,
Clerk
Second Circuit

Carolyn Clark Campbell
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of July one thousand nine hundred and ninety-eight.

AMSTERDAM VIDEO INC., et al.,

Plaintiffs-Appellants,

v. Dkt No.: 98-7270

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Plaintiffs-Appellants Amsterdam Video Inc., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth J. Meador

Beth J. Meador,

Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

Argued: April 29, 1998
Decided: June 3, 1998

Docket Nos. 98-7269, -7270

United States
Court of Appeals
Filed Jun 3, 1998
George Lange III, Clerk
Second Circuit

Rachel Hickerson, Derek Jones, Ty McConnell, and Elliot Stamler,

Plaintiffs-Appellants,

Amsterdam Video Inc., A & X Entertainment Inc., d/b/a Playpen II, Adult Video, Inc., Ascot Space Amusement, Inc., d/b/a Ascot Theatre, Big Apple Cinemas Inc., d/b/a Show Follies Theater, Brett Distributors, Inc., d/b/a Media Distributors, Capri Cinema Inc., Capwell Entertainment, Inc., d/b/a Legz Diamond's Playhouse, Church Street Cafe Inc., d/b/a Baby Doll Lounge, College Pt. Rest. Corp., d/b/a Gallagher's II, Crazy Fantasy Video, Inc., Cupid's Treasures, Inc., d/b/a Banana Video and Unicorn, Dara Distributors Inc., d/b/a Love Shack, Desire Video Inc., E & A Books, Inc., E & A Video and Magazine Inc., Ed-Mart Bar & Grill Inc., d/b/a Penny Whistle, For the People Theatres of N.Y., Inc., d/b/a Fair Theatre, Four Keys Enterprises, Inc., d/b/a Hollywood Peepshows, Fourteenth St. Enterprises Inc., d/b/a All Male Adult Video, Fun City Video Corp., G & D Merchandise Corp., d/b/a Peepland, Gotham Exhibitor Inc., d/b/a Peep O Rama, Helen Wolff Ltd., d/b/a Come Again, I.S. Sultars Inc., J & J Tummy Yummies Corp., d/b/a Naked City, JGJ Merchandise Corp., d/b/a Peepland/Valentina's II, JHM Video Corp.,

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JUM Operating Corp., d/b/a Peepland, JVR Video Center Inc., d/b/a Playground, Kinematics Merchandising & Distributors, Inc., d/b/a Kinematics, Kisma Video, Inc., L & T Video, Inc., d/b/a Badlands Adult Video, Madeline D'Anthony Ent. Inc., d/b/a Harmony Theatre, Manhattan Video Inc., Marquis Video Inc., d/b/a Marquis Video, Mirage Productions Inc., d/b/a Love Shack, Montana Holdings Inc., d/b/a Runway 69, Nawan Entertainment Inc., d/b/a Euro World, Nilupul Video Inc., N.R.S. Video Inc., NY Video Inc., d/b/a Love Shack, Pabon Theatre Corp., d/b/a Eros Theatre, Peregrine Enterprises, Inc., d/b/a Paradise Club, R.E.J.M., Inc., d/b/a Big Top, Ron Bob Pub Inc., d/b/a Gallagher's, Sami's Video Warehouse, d/b/a Warehouse on the Block, LTD, Serendib Video Inc., d/b/a Serendib Video, SPH Video Corp., Star Distributors, LTD, Statewide Video Inc., Steam Heat Inc., STS Video Inc., d/b/a Adult Video, Suemar Video, Inc., d/b/a Goodtime Video, Third Avenue Entertainment Inc., d/b/a XXX Video, Thunder Video Inc., Town Video Sales, Inc., d/b/a Les Hommes Book Shop, Video, Video, Video, Inc., Video 30 of Queens Inc., d/b/a Ecsxxxtasy Video, West Video Inc., Zideo Video Inc., 21 Ann Street Corp., d/b/a Ann Street Adult Entertainment, 130 C Street Corp., d/b/a Christopher Street Book Shop, 155 Video Center Corp., d/b/a Peepworld, 300 Book Center, 303 W. 42nd Street Enterprises Inc., d/b/a Show World, 323 Canal St. Inc., 325 W. 45th St. Rest. Corp., d/b/a Private Eyes, 35-30 38th St. Corp., d/b/a Cityscape, 412 8th Ave. Corp., d/b/a Nude New York City, 45-08 Vernon Blvd. Corp., d/b/a Riverhead Inn, 603 Video Inc., 610 Video Store Inc., 691 8th Avenue Corp., 691 Video Center Corp., 693 Video Corp., d/b/a TNL Video, 711 Associates Ltd., d/b/a Peepland, 729 6th Avenue Corp., d/b/a Billy's Topless, 733A Corp., d/b/a Video Palace, 763 Video Store Inc.,

777-779 8th Ave. Corp., d/b/a Hollywood Twin, 81-22 Baxter Ave. Lounge Inc., d/b/a ILDA's Place II,

Plaintiffs Appellants.

v.

The City of New York, Hon. Rudolph W. Giuliani, as Mayor of the City of New York, Joseph B. Rose, as Director of City Planning, Department of City Planning of the City of New York, and Gaston Silva, as Commissioner of Buildings, Department of Buildings of the City of New York,

Defendants-Appellees,

Times Square Business Improvement District, Center for the Community Interest, Bellaire/Bell-Vill Civic Association, Bnos Israel Girls' School, Bowne Park Civic Association, Briarwood Community Association, Bronx Community Board # 12, Brooklyn Civil Council, Brooklyn Tenants Council, Cardinal Spellman High School, Coalition of United Residents for a Safer Environment, College Point Board of Trade, Committee for a Better and Safer Nostrand Avenue, Communities of Masbeth and Elmhurst Together, Community School District 21 Presidents' Council, Congregation Bnai Shloima Zalman, Crown Heights Taxpayers and Civic Association, Douglaston Civic Association, East Midwood Neighborhood Association, Councilmember Andrew Eristoff, Grand Central Partnership, Holliswood Civic Association, Hudde Junior High School Parents Association, Jackson Heights Community Development Corporation, Kings Highway District Management Association, Kingsway Jewish Center; Lawyers' Committee on Violence, Manhattan Terrace Civic Association,Councilmember Helen Marshall, Midwood Civic Action Council Inc., New Northern Boulevard

Business Association, Northern Boulevard Merchants' Association, 100-299 East 77th Street Block Association, Prospect Park Yeshiva, Queens Braddock Civic Association, Queens Village Civic Association, Real Estate Board of New York, Residents Against Street Prostitution, Rosedale Block Association, Rosedale Civic Association, Councilmember John Sabini, 34th Street Partnership, United Civic Council of Queens, United Community Civic Association, Councilmember Anthony Weiner, West 45th Street Block Association, West 47th/West 48th Street Block Association and West 90's/West 100's Neighborhood Coalition,

Defendants-Respondents-Intervenors-Appellees.

Before: VAN GRAAFEILAND, MESKILL, and CABRANES, Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) denying plaintiffs' motion for a temporary restraining order and preliminary injunction to stay the enforcement of an amendment to the Zoning Resolution of the City of New York that regulates the zoning of "adult establishment[s]." The district court concluded that plaintiffs were collaterally estopped from relitigating in federal court the same issues that were decided against them in the prior litigation of their state constitutional claims in state court.

Affirmed.

Herald Price Fahringer, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, New York City (Erica T. Dubno, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP; J. Michael Murray, Berkman, Gordon, Murray & DeVan, of counsel), for Plaintiffs-Appellants Amsterdam Video, Inc., et al.

Beth Haroules, New York Civil Liberties Union Foundation, New York City (Arthur N. Eisenberg, Norman Siegel, New York Civil Liberties Union Foundation, of counsel), for Plaintiffs-Appellants Rachel Hickerson, et al.

Leonard J. Koerner, Office of the Corporation Counsel of the City of New York, New York City (Michael D. Hess, Corporation Counsel of the City of New York, Gabriel Taussig, Elizabeth S. Natrella, of counsel), for Defendants-Appellees.

Frederick A.O. Schwarz, Jr., Cravath, Swaine & Moore, New York City, for Defendant-Respondent-Intervenor-Appellee Times Square Business Improvement District.

Wayne A. Cross, Dewey Ballantine LLP, New York City, for Defendants-Respondents-Intervenors-Appellees Center for the Community Interest, et al.

JOSE A. CABRANES, Circuit Judge :

This case concerns an amendment to the Zoning Resolution of the City of New York (the "Zoning Amendment") regulating the zoning of "adult establishment[s]," as defined by the Zoning Amendment. The principal provisions of the Zoning Amendment limit the permissible locations of adult establishments to non-residential districts[1] and require that they be located – within

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[1] Even prior to the passage of the Zoning Amendment, New York City's Zoning Resolution prohibited new commercial development in residentially zoned districts. Under the Zoning Amendment, adult establishments are also barred from certain districts that are zoned for

the districts in which they are permitted – at least 500 feet away from any school, day care center, or house of worship; at least 500 feet from excluded districts; and at least 500 feet from one another. Plaintiffs in these consolidated cases are patrons and owners of adult establishments within New York City who claim that the Zoning Amendment violates their rights to free expression under Article I, § 8 of the New York State Constitution and the First Amendment of the United States Constitution. In a case involving a different set of plaintiffs, we recently upheld the Zoning Amendment against facial federal constitutional challenges under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *See Buzzetti v. City of New York*, 140 F.3d 134, 1998 WL 130866 (2d Cir. Mar.20, 1998).

The factual background of the Zoning Amendment is detailed both in *Buzzetti* and in prior state and federal decisions arising from the instant litigation, with which we assume familiarity. *See Hickerson v. City of New York*, __ F.Supp. __, 1998 WL 105583 (S.D.N.Y. Mar. 6, 1998); *Hickerson v. City of New York*, 932 F.Supp. 550 (S.D.N.Y.1996); *Stringfellow's of New York, Ltd. v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (N.Y.Sup.Ct.1996), *aff'd*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 382, 1998 WL 77749 (N.Y. Feb. 24, 1998). The instant appeal is from an order of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*), dated March 6, 1998, which denied plaintiffs' motion for a temporary restraining order and a preliminary injunction to stay the enforcement of the Zoning Amendment.[2] Although

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commercial and manufacturing uses, but that permit new residential development as well.

[2] During the prior state-court proceedings, the enforcement of the Zoning Amendment was stayed by court order. The stay was terminated by Judge Cedarbaum's March 6, 1998 order denying plaintiffs' application for a preliminary injunction. Judge Cedarbaum stayed her order until March 11, 1998, to allow plaintiffs to seek a stay in this Court. Judge Walker extended the stay to March 11, 1998 so that the issue could

at the heart of this litigation is a controversy over free expression, plaintiffs have already presented their free-speech claims to the New York courts. The only question before us is whether the New York courts' rejection of plaintiffs' state constitutional claims forecloses plaintiffs from relitigating, in the form of a First Amendment claim in federal court, the same issues that were resolved against them in state court. We agree with the district court that the "full faith and credit" statute prevents a federal court from revisiting the same issues that were decided against plaintiffs by the New York state courts, which provided plaintiffs with a full and fair opportunity to litigate these issues. Accordingly, we affirm.

I.

We review the district court's denial of a preliminary injunction for an abuse of discretion. *See Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir.1996). "It is by this time black-letter law that the party seeking a preliminary injunction must establish that: (1) absent injunctive relief, it will suffer an irreparable injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the movant." *Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A.*, __ F.3d __, 1998 WL 220954, at *9 (2d Cir. May 6, 1998). "Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction." *Bery*, 97 F.3d at 693. Because we conclude, however, that plaintiffs are collaterally estopped from relitigating the issues that govern their First Amendment claim, they can show neither "a likelihood of

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be considered by a three-judge panel, and the panel ordered the appeal to be expedited and extended the stay through the hearing of the expedited appeal. At oral argument of this expedited appeal on April 29, 1998, we extended the stay until further order of this Court.

success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation."

Under the full faith and credit statute, 28 U.S.C. § 1738,[3] "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) (noting that § 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims"); *see generally Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ....") (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 42 L.Ed. 355 (1897) (ellipses in original)). New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action. *See, e.g., In re Sokol*, 113 F.3d 303, 306 (2d Cir.1997); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823, 826-27, 467 N.E.2d 487, 490-91 (1984).

We agree with the district court that the issues decided and the standards applied by the New York state courts in rejecting plaintiffs' state constitutional challenge are the

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[3] 28 U.S.C. § 1738 provides, in pertinent part, that state court determinations "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken."

same that would be applicable to plaintiffs' First Amendment claim. Under both the federal and state Constitutions, the Zoning Amendment must: (1) be "content neutral," in the sense that it is aimed not at the restricted speech itself but at the negative secondary consequences that flow from it; (2) serve substantial government interests and be no broader than necessary to serve these interests; and (3) leave open reasonable alternative avenues of communication. *Compare City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), *with Stringfellow's of New York, Ltd. v. City of New York*, 91 N.Y.2d 382, 1998 WL 77749, at *5 (N.Y. Feb. 24, 1998). The New York Court of Appeals unanimously held that the Zoning Amendment met these standards – just as this Court in *Buzzetti* found the Zoning Amendment constitutionally unobjectionable on the record then before us – and this determination is equally dispositive of plaintiffs' claim under the First Amendment. *Cf. Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479-80, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) (holding, in Title VII case, that "[a]lthough the claims presented to the NYHRD [New York State Division of Human Rights] and subsequently reviewed by the Appellate Division were necessarily based on New York law, the alleged discriminatory acts are prohibited by both federal and state laws. The elements of a successful employment discrimination claim are virtually identical; petitioner could not succeed on a Title VII claim consistently with the judgment of the NYHRD that there is no reason to believe he was terminated or not rehired because of age or religion. The Appellate Division's affirmance of the NYHRD's dismissal necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless." (footnotes omitted)).

Plaintiffs do not deny that the state and federal standards are nominally the same in all material respects, but rather argue that the standards are applied differently in state and federal court. In particular, plaintiffs contend that federal

courts require greater proof from municipalities that the non-speech-related government interests at stake are substantial and that reasonable alternative avenues of communication remain available. We note that this contention is in stark contrast to plaintiffs' repeated assertions in earlier stages of this litigation that New York courts apply more favorable standards to their free-speech claims than federal courts. In any event, apart from their recent vintage, plaintiffs' arguments are mistaken.

A. Substantial Government Interests

With respect to the substantiality of New York's non-speech-related interests in the Zoning Amendment, the New York Court of Appeals observed that "the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City." *Stringfellow's*, 91 N.Y.2d at __ 1998 WL 77749, at *6. The court then reviewed in detail this legislative record, which included studies by the Times Square Business Improvement District, the Chelsea Action Coalition and Manhattan Community Board 4, and the Department of City Planning ("DCP"). Each of these studies linked the presence of adult establishments to increased crime and decreased property values. *See id.* at *6-7.[4] The court also noted that, apart from the City's own studies, the legislative record contained the conclusions of studies conducted by city councils and town boards

[4] Although plaintiffs argue on appeal that the DCP's own study suggests no correlation between adult establishments and the negative secondary effects identified by the City, the New York Court of Appeals took account of, and rejected, this very argument, observing that "[a]lthough the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area." *Id.* at *7.

throughout the country, which also showed a correlation between adult establishments and negative secondary effects such as increased crime, depressed real estate markets, and an overall decline in the quality and character of surrounding neighborhoods. *See id.* Finally, the court rejected plaintiffs' complaints about the sufficiency of the evidence, holding that it was entirely appropriate to rely on studies from other jurisdictions – particularly in light of the fact that City officials had considered the comparability and reliability of these studies – and that the "non-empirical" nature of some of the City's evidence (*i.e.*, from surveys of businesses and real-estate brokers) did not render it valueless or insubstantial. *See id.* at *8.

Plaintiffs now raise the same objections to the City's evidence that were rejected by the New York Court of Appeals, and despite that court's thorough review and analysis of the legislative record, plaintiffs claim that federal law requires the City to provide greater evidence of negative secondary effects than the New York courts required. Accordingly, plaintiffs contend that they are not estopped from relitigating the sufficiency of the City's evidence under this allegedly more stringent federal standard. In arguing that a more stringent standard exists, plaintiffs rely almost exclusively on *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir.1997) (en banc), a case that provides no support whatsoever for their position. *Phillips* was an adult-use zoning case in which the Third Circuit required additional evidentiary support for a zoning ordinance that had been upheld by the district court "(1) without an answer from the defendants identifying the secondary effects alleged to justify the burden on expression, and (2) without a record supporting the reasonableness of any legislative expectations regarding the likelihood of these secondary effects and the ameliorative effect of the ordinance." *Id.* at 173. The Third Circuit noted that, whereas in *Renton* the Supreme Court had considered the City of Renton's legislative record to be adequate where it consisted solely of studies from other cities that could reasonably be deemed relevant, "[h]ere, the district court had

no way of knowing what problem or problems the Borough thought it was facing and there is no study or other evidence in the record concerning the secondary effects of 'adult entertainment uses.'" *Id.* at 174. In order to avoid "reduc[ing] the First Amendment to a charade in this area," *id.* at 175, the Third Circuit required the Borough at least to "identify" the secondary effects with some particularity, and to "offer some record support for the existence of those effects," *id.* Far from suggesting that federal law would require more exacting scrutiny of the legislative record than was undertaken by the New York courts in this case, *Phillips* stands for nothing more than the unremarkable proposition that a barren legislative record will not suffice under the First Amendment – a proposition which is unhelpful to plaintiffs, in light of the fact that the legislative record in the present case is quite extensive, as the state courts recognized.

In any event, quite apart from the fact that we find no merit in plaintiffs' argument that the federal standard for judging the substantiality of New York's non-speech-related interests is stricter than the state standard, this Court, in *Buzzetti*, has already considered and rejected the argument that the legislative record is inadequate, as a matter of federal law, to support the City's legitimate and substantial interests in the Zoning Amendment. As we stated in *Buzzetti*:

> *Renton* emphasized that city officials were not required to make particular findings regarding the secondary effects of adult entertainment in *Renton* itself, but rather were "entitled to rely on the experiences of ... other cities." *Renton*, 475 U.S. at 51, 106 S.Ct. at 931; *see id.* at 51-52, 106 S.Ct. at 931 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."). Thus, New York City's reliance on studies from a variety of other areas of the country was well-placed.

> But ... New York City went beyond this minimal requirement: the DCP conducted its own detailed study, consulted other studies conducted in particular neighborhoods of New York City, and considered testimony given at public hearings in New York. __ F.3d at__,1998 WL 130866, at *7 (first ellipsis in original). Accordingly, it is clear that there is no basis for allowing plaintiffs to relitigate this issue in federal court.

B. Alternative Avenues of Communication

Plaintiffs' argument that federal courts apply a more stringent standard than the New York courts applied to determine whether there are "reasonable alternative avenues of communication" is also unavailing. Indeed, the New York Court of Appeals summarized the standard that federal courts have applied, and proceeded to apply that very standard as the basis for its inquiry under the state Constitution. The court's discussion merits quotation at length:

> Relying on a formula derived from *City of Renton v. Playtime Theatres*..., the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads" (*id.*, at 53-54). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (*see*, *City of Renton v. Playtime Theatres*, [475 U.S.] at 53; *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-25 [(5th Cir.)], cert [.] denied [,] 516 U.S. 988, 116 S.Ct. 516, 133 L.Ed.2d 425 [(1995)]; *Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068,

1070 [(5th Cir.1994)]; *see also, Town of Islip v. Caviglia*, [73 N.Y.2d 544,] 555, 560 [(1989)] (areas of a municipality set aside for adult uses need not be prime locations)). Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (*see, Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1530-31 [(9th Cir.1993)], cert [.] denied [,] 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190 [(1994)]; see also, *Woodall v. City of El Paso, supra*; *Alexander v. City of Minneapolis*, 928 F.2d 278 [(8th Cir.1991)].

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see* [*Topanga*], 989 F.2d, at 1531). Notably, these considerations dovetail nicely with Islip's requirement that there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Stringfellow's, 91 N.Y.2d at --, 1998 WL 77749, at *9-10.

Significantly, the two cases most heavily relied upon by plaintiffs in arguing that federal law imposes more of an evidentiary burden on the City to prove the availability and suitability of alternative sites than the New York state courts imposed – *Topanga Press, Inc. v. City of Los Angeles* and

Woodall v. City of El Paso – were cited and relied upon by the New York Court of Appeals. Forced to acknowledge this fact, which strongly suggests that the state court was not answering a different question or applying a standard less favorable to plaintiffs than federal courts would apply, plaintiffs argue that while "the New York Court of Appeals did refer to the *Topanga* and *Woodall* decisions[, a]nd ... did suggest that the City was obligated to demonstrate 'the physical and legal availability of alternative sites .... and whether those sites are part of the actual business real estate market[,]' ... there is a serious analytic gap between this language ... and the factual record developed in the state trial court." Brief of Hickerson Appellants at 31-32. Plaintiffs argue, in other words, that while the New York Court of Appeals purported to be making the same determination that a federal court would make under federal law to determine the availability of "reasonable alternative avenues of communication," plaintiffs should not be collaterally estopped from relitigating this issue because the "serious analytic gap" between the evidence and the recited standard belies any conclusion that federal standards were genuinely applied.

We find no such "serious analytic gap," nor any reason to doubt that the New York Court of Appeals answered the same question that would be dispositive under federal law. Plaintiffs' primary argument to the contrary is that federal law requires municipalities to identify the *specific* physically and legally available relocation sites. Plaintiffs have produced an affidavit from a land-use planning consultant, Robert McLaughlin (the "McLaughlin Affidavit" or "Affidavit"), which asserts that some of the land identified by the City as available for relocating adult establishments is not realistically available, for a variety of reasons–some of the land, for example, is allegedly occupied by "oil tank farms" and structures including "numerous and large facilities of the New York City Sanitation Department." McLaughlin Affidavit at 24, 26. Unless the City can precisely identify the "physically and legally available" sites to which the

approximately 147 adult establishments that will need to relocate can move, plaintiffs argue, the City has not carried its burden of proving that "reasonable alternative avenues of communication" exist under federal law.

Plaintiffs' argument suffers from several flaws. First, we are aware of no federal case, and plaintiffs direct our attention to none, that requires municipalities to identify the exact locations to which adult establishments may relocate, as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are "physically and legally available" to accommodate the adult establishments. This is precisely the standard of proof to which the New York Court of Appeals held the City. Clearly then, to second-guess that court's determination of this issue would violate the full faith and credit statute.

After observing that "it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available," *Stringfellow's*, 91 N.Y.2d at__, 1998 WL 77749, at *10, the New York Court of Appeals noted the City's evidence that, after excluding land identified by the City as being encumbered by properties unlikely to be developed for commercial use, 4% of the total land area of the City remained open to adult establishments. Maps prepared by the City reflected that, after factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available. *See id.* Further, the New York Court of Appeals considered the City's evidence that the zoning districts left open to adult establishments "permit a wide mix of commercial, retail, entertainment and manufacturing uses," *id.*, and that all of these areas in Manhattan and 80% of the areas in the other boroughs of New York are within a ten-minute walk from a subway line or major bus route, *see id.*[5]

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[5] The accessibility of potential sites in the so-called "outer boroughs" disposes of plaintiffs' argument – which, in any event, is without foundation and unsupported by case law – that in contrast to the state

The court did not ignore plaintiffs' evidence – namely, the McLaughlin Affidavit – that portions of the 4% of "unencumbered" land identified by the City were not realistically available, but rather found this evidence insufficient to raise a material question of fact regarding the availability of "reasonable alternative avenues of communication." The court partially discredited the McLaughlin Affidavit because McLaughlin considered land to be "unavailable" that, under *Renton*, is not to be excluded – such as industrial areas, undeveloped land, and warehouse areas. *See Renton*, 475 U.S. at 53-54 (finding available land to be adequate where it included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space," and observing that the fact that the establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation"); *see also, e.g., Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d at 1069-70 (holding that adult-use zoning ordinance provided reasonable alternative avenues of communication even though 90% of prospective sites were on undeveloped land). The court also recognized that while the McLaughlin Affidavit identified, within the 4% of purportedly "unencumbered" land identified by the City, specific sites that were clearly not realistically available, this was insufficient to cast doubt upon the availability of "reasonable alternative avenues of communication" where the City had produced evidence showing that this land could accommodate over 500 establishments under the terms of the Zoning Amendment, approximately *three times* the number of establishments that currently exist:

> The most significant flaw in McLaughlin's affidavit ... is the absence of any attempt to quantify his observations or to make concrete allegations as to

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courts' analysis, the First Amendment requires proof of adequate available sites on a borough-by-borough basis.

> precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable.[6] To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Stringfellow's, 91 N.Y.2d at__, 1998 WL 77749, at *11; *see also Stringfellow's*, 171 Misc.2d at 396, 653 N.Y.S.2d at 814 ("Even if the City's estimate overstates the number of potentially viable relocation sites, there still remains ample space for more than the existing numbers of adult establishments.... [N]othing in *Renton, Islip* or any existing case law requires the City to identify specific sites that are actually available."); *cf. Woodall v. City of El Paso*, 49 F.3d at 1126 (stating, in response to complaints by adult

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[6] McLaughlin subsequently did quantify, in a new but substantially similar affidavit submitted to the district court, the number of sites he considered to be realistically available (90). However, in light of our agreement with the district court that plaintiffs had a full and fair opportunity to present evidence in state court, *see infra*, this belated submission does not affect our collateral estoppel inquiry. "A party ... cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first." 18 James Wm. Moore, *et al., Moore's Federal Practice* § 132.02(2)(d), at 132- 26 (3d ed.1998); *see, e.g., Yamaha Corp. v. United States*, 961 F.2d 245, 254-55, 257 (D.C.Cir.1992), *cert. denied*, 506 U.S. 1078, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993).

establishments as to the viability of particular sites, that "even if we agreed that ... these sites suffered from defects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable").

In sum, there is no reason to doubt that the New York Court of Appeals applied the same standard and answered the same questions that apply under federal law in determining whether the Zoning Amendment provided for "reasonable alternative avenues of communication." The argument that federal law would have required the City to identify the precise sites to which adult establishments could relocate is not only unsupported by any federal case law, but is belied by our recent decision in *Buzzetti*. In *Buzzetti*, far from suggesting that the City's evidence was inadequate because it was not site-specific, we held that "there can be no doubt on this record that the Zoning Amendment allows for reasonable alternative avenues of communication." 140 F.3d at__, 1998 WL 130866, at *8 (internal quotation marks omitted). Although we did not have the McLaughlin Affidavit before us in *Buzzetti*, the McLaughlin Affidavit is only relevant to whether plaintiffs have produced enough counter-evidence to cast doubt on the City's evidence, and it does not change the fact that under federal law the City was not required to identify precise relocation sites in order to prove the existence of "reasonable alternative avenues of communication." The state courts' determination that the McLaughlin Affidavit did not cast sufficient doubt on the City's evidence to preclude summary judgment–based largely on the Affidavit's failure to quantify the number of feasible sites, its reliance on premises that were invalid under *Renton*, and the persuasiveness of the City's own evidence – does not, in short, represent a departure from federal standards. The full faith and credit statute therefore bars plaintiffs from relitigating the issue of alternative sites in federal court.

C. Plaintiffs' Opportunity to Litigate the Issues in State Court

Collateral estoppel will only apply if plaintiffs had a "full and fair opportunity" in New York state court to litigate the issues that they now seek to relitigate in federal court. *See In re Sokol*, 113 F.3d at 306; Ryan, 62 N.Y.2d at 501, 478 N.Y.S.2d at 826, 467 N.E.2d at 490. Plaintiffs, as the parties opposing the application of collateral estoppel, bear the burden of proving that they were denied this full and fair opportunity. *See In re Sokol*, 113 F.3d at 306; *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). Under New York law, "[a] determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of the realities of the [prior] litigation, including the context and other circumstances which ... may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." *Ryan*, 62 N.Y.2d at 501, 478 N.Y.S.2d at 827, 467 N.E.2d at 491 (internal quotation marks and citation omitted; alterations in original). Included among the factors to be considered are "the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, [and] the competence and expertise of counsel." *Id.* Substantially for the reasons stated by Judge Cedarbaum, we believe that plaintiffs have not met their burden of proving that they were denied a full and fair opportunity to litigate their claims in state court. See *Hickerson*,__F.Supp. at__, 1998 WL 105583, at *5-6.

Accordingly, because the same issues decided by the state courts are dispositive of plaintiffs' claims under the First Amendment, and because plaintiffs had a full and fair opportunity to litigate these issues in state court, they are collaterally estopped from relitigating them in federal court.

II.

Plaintiffs argue that they are not precluded from litigating their First Amendment claim in federal court because they informed the state court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), that they intended to reserve the right to litigate their federal claims in federal court. *England* held that, after a federal court has abstained under the doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), in order to obtain an authoritative interpretation of state law that could potentially moot or influence the federal constitutional questions presented, parties who have been remitted to state court against their will are not forced to litigate their federal claims there, but may reserve the right to a federal adjudication of these claims. See 375 U.S. at 421-22. The Supreme Court in *England* stated its "fundamental objections to any conclusion that *a litigant who has properly invoked the jurisdiction* of a Federal District Court to consider federal constitutional claims can be *compelled, without his consent and through no fault of his own*, to accept instead a state court's determination of those claims." *Id.* at 415 (emphasis added).

Consistent with *England's* focus on the problem of depriving a litigant who has "invoked" the jurisdiction of a federal court from being deprived of that choice "without his consent and through no fault of his own," the Supreme Court appeared to suggest in a subsequent case that an *England* reservation would only be available when the federal courts were a litigant's initial forum of choice. *See Allen v. McCurry*, 449 U.S. 90, 101 n. 17, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (characterizing *England* as applying "[w]here a plaintiff properly *invokes federal-court jurisdiction in the first instance* on a federal claim" (emphasis added)). A similar suggestion was made in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 84-85 & n. 7, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). The question in *Migra* was whether litigants who could have, but did not, raise certain

claims in their state case were precluded from raising those claims in a subsequent § 1983 suit in federal court. The Court held that such litigants were indeed so precluded, and relied heavily on the fact that such litigants voluntarily chose to proceed initially in state court. The petitioner in *Migra*, the Court observed, did "not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court." *Id.* at 84-85. Having emphasized the voluntariness of the decision to file suit initially in state court, the Court then carefully noted that *England* provides a way for plaintiffs to return to federal court after a district court has abstained. *See id.* at 85 n. 7. By contrasting *England* with the situation in which a plaintiff has chosen to file suit in state court even though he could have sought an adjudication of his federal constitutional claims in federal court, *Migra* can be read to suggest that *England* was not aimed at litigants who initially brought suit in state court. *Cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir.1992) ("The *Migra* Court made clear that *England* could apply when a litigant with a federal constitutional claim is *involuntarily* in state court." (emphasis added)).

In the instant case, plaintiffs did not invoke the jurisdiction of the federal court in the first instance, only to have the court invoke *Pullman* abstention. Instead, they filed suit in state court, which they believed would look upon their free-speech claims more favorably. Moreover, after defendants removed the case to federal court, plaintiffs moved to remand the case in its entirety (including their First Amendment claim) to state court, arguing that the case was not properly removable and also vigorously urging that their state constitutional claims "predominate[d]," while their First Amendment claim was a mere "adjunct" or "supplement." *See* Affirmation on Behalf of Amsterdam Video Plaintiffs, in Support of Motion to Remand, dated April 26, 1996 (United States District Court for the Southern District of New York,

No. 96 Civ. 2204), in Joint Appendix at 227. The district court, in response to plaintiffs' motion, abstained under *Pullman* and remitted the state claims to state court, but denied plaintiffs' request to remand the federal constitutional claims and instead stayed these claims pending the outcome of the state litigation. See 932 F.Supp. at 551. Only then did plaintiffs file an *England* reservation.

Under these circumstances, plaintiffs cannot meaningfully be said to have been deprived of a federal forum for their federal claims "without [their] consent and through no fault of [their] own." *England*, 375 U.S. at 415. If *defendants* had not sought to avail themselves of a federal forum after plaintiffs filed suit in state court, plaintiffs would have been held to their choice of forum and would have been required to submit their First Amendment claim to the New York state courts. The same would have been true if plaintiffs had been successful in moving to remand the entire case to state court. Alternatively, if plaintiffs' priority had been to obtain a federal forum for their First Amendment claim, they could have filed suit in federal court initially. *Cf. Migra*, 465 U.S. at 84-85 & n. 7. In light of *England's* emphasis on the need to preserve access to a federal forum *for those litigants who have chosen it*, and in light of the suggestive characterizations of *England* by the Supreme Court in the later cases of *Allen v. McCurry* and *Migra*, we agree with those courts that have held that *England* applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants such as the instant plaintiffs who voluntarily chose to file suit in state court. *See Peduto v. City of North Wildwood*, 878 F.2d 725, 729 n. 5 (3d Cir.1989) ("[A]s plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of *England* has no relevance here."); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir.1988) (*England* "does not apply where the plaintiff voluntarily chooses to pursue a state action first."); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st Cir. 1986) ("In order to make an *England* reservation, a litigant must establish its right to have its federal claims adjudicated

in a federal forum by properly invoking the jurisdiction of the federal court in the first instance."); *cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d at 1304-05 (considering itself bound by predecessor-circuit decision, *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331, 1332 (5th Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 260, 50 L.Ed.2d 180 (1976), allowing plaintiffs to file *England* reservation prior to bringing suit in federal court, but noting that "*Jennings* effectively abolishes the first requirement for an *England* reservation – filing in the first instance in federal court. Thus, it appears that the *Jennings* panel misread *England*, effectively rewriting the requirements for a valid *England* reservation."); *see generally* 17A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4243, at 6 (1998 Pocket Part) ("The *England* procedure strictly speaking is applicable only if a case was begun in federal court.").

We are not persuaded that a contrary result is required by footnote 13 of *England*, which contains some broad language seized upon by plaintiffs, but which we read simply to indicate that an *England* reservation is available not only to plaintiffs, but also to defendants who have removed the case to federal court, only to have the district court abstain. Footnote 13 states:

> The reservation may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question. Thus, while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant. The latter may protect his right by either declining to oppose the

> plaintiff's federal claim in the state court or opposing it with the appropriate reservation.

England, 375 U.S. at 422 n. 13. Despite plaintiffs' reliance on the statement that "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question," we believe that it is clear, in context, that this footnote was only intended to clarify that *England* applies to defendants as well as plaintiffs, and that the particular language relied upon by plaintiffs was intended simply to clarify that a plaintiff may not, by fully litigating his federal claims in state court, deprive a defendant of his right to return to the federal forum. We do not read this language to render irrelevant a plaintiff's choice to avail himself of state, rather than federal, jurisdiction in the first instance, and we believe such a reading would contravene *England's* emphasis on preserving the federal forum for those who have "invoked" it but have been deprived of it "through no fault of [their] own." *Id.* at 415. Plaintiffs not only voluntarily filed suit in state court, but sought to remand the entire case to state court after it had been removed to federal court by defendants; while footnote 13 of *England*, under these circumstances, would have protected *defendants* from being deprived of their choice of a federal forum, it does not allow defendants' choice of a federal forum to be preserved by *plaintiffs*.

III.

Apart from their reliance on *England*, plaintiffs raise several other arguments as to why collateral estoppel does not apply, each of which is without merit. First, citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), plaintiffs argue that because their federal claim arises under the First Amendment, they are entitled to an independent examination of the record. In First Amendment cases, notwithstanding the "clearly erroneous" standard of factual review set forth in

Fed.R.Civ.P. 52(a), "we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court." *Bery*, 97 F.3d at 693 (citing, *inter alia, Bose Corp.*, 466 U.S. at 499). However, this rule only concerns the proper level of *appellate* review, and does not bar the application of collateral estoppel. *See Ferris v. Cuevas*, 118 F.3d 122, 125 n. 3 (2d Cir.1997) (citing *Bose* requirement, but noting, pursuant to finding plaintiffs' First Amendment claims that were not raised in prior state-court proceedings to be barred by *res judicata*, that "[b]ecause our holding today is procedurally based and does not reach the merits ... we do not conduct this higher level of factual review.").

Plaintiffs also rely on the doctrine that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana*, 440 U.S. at 159. They argue that such a change occurred when Mayor Rudolph W. Giuliani, one of the defendants in this action, stated at a press conference following the New York Court of Appeals' decision that the Zoning Amendment would "severely limit[ ]" the places adult establishments could relocate to, and would "reduce the number in the city to something like 20 or 30." Text of Mayor Giuliani's City Hall Press Conference, February 24, 1998, in Joint Appendix at 914. *Montana* makes clear that the exception to collateral estoppel based on intervening changes in the factual record applies only when these changes "significant[ly]" affect the overall complexion of the record. See 440 U.S. at 157; 18 James Wm. Moore, *et al., Moore's Federal Practice* § 132.02(2)(e), at 132-27 to -28 (3d ed. 1998) (in order to render issue preclusion inapplicable, "a difference in pertinent facts" must be "sufficient to substantially change the issue"). Mayor Giuliani's statements to the press, particularly when compared to the extensive legislative record compiled by the City – whose conclusions actually differ from those stated at Mayor Giuliani's press conference – simply do not meet that standard.

A final point that, in plaintiffs' view, counsels against the application of collateral estoppel, is that Supreme Court review is unavailable with respect to the New York state courts' determination of a question of state law. This argument fails to appreciate that the district court made a determination of federal law – namely, that the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment. If the district court's interpretation of the governing First Amendment standards were mistaken, and if this Court were mistaken in affirming the district court's interpretation of federal law, the Supreme Court would remain free to so find and to order this case to proceed in district court.

IV.

In sum, under the full faith and credit statute and New York's law of collateral estoppel, plaintiffs may not relitigate their First Amendment claim in federal court because the same issues that are dispositive of this claim have already been decided in state court. Plaintiffs had a full and fair opportunity to litigate these issues in state court, and they raise no valid ground for barring the application of the doctrine of collateral estoppel. Accordingly, plaintiffs can show neither "a likelihood of success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation," and the district court's denial of plaintiffs' motion for a preliminary injunction was entirely proper. We have considered all of plaintiffs' other arguments, and find them to be without merit. The stay of Judge Cedarbaum's March 6, 1998 order is hereby vacated, the judgment of the district court is affirmed, and the Zoning Amendment may be enforced forthwith.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: HONORABLE
DENNIS JACOBS,
HONORABLE
PIERRE N. LEVAL,
HONORABLE
JOHN R. GIBSON,*
Circuit Judges.

United States
Court of Appeals
Filed
March 17 1998
George Lange III,
Clerk
Second Circuit

AMSTERDAM VIDEO

v.

CITY OF NEW YORK

ORDER

978-7270

HICKERSON

v.

CITY OF NEW YORK

98-7269

On October 25, 1995 the New York City Council passed the Zoning Amendment at issue in this case (the "Amendment"), which established controls over the geographic distribution of adult entertainment establishments in the City of New York. Shortly thereafter, plaintiffs brought this action challenging the constitutionality of the Amendment under both the New York and federal constitutions. Since that time, while this action was litigated in both the State and federal courts, the effectiveness of the Amendment has been stayed by court order.

* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

On March 6, 1998, Judge Cedarbaum terminated the stay by her order denying Plaintiffs' application for a preliminary injunction. Plaintiffs appeal from that decision and move for a stay of that order pending determination of the appeal, so that the effectiveness of the Amendment would remain subject to the previously imposed stay while the appeal was under consideration. Judge Cederbaum stayed her order until March 11, 1998, so that plaintiffs could seek a stay in this court. Judge Walker extended the stay to this date so that the issue could be considered by a three-judge panel of the court.

Plaintiffs contended that the district court's decision is likely to be reversed on appeal because it relied inappropriately on the doctrine of collateral estoppel. The defendants contend and the district court found, that the questions adjudicated by the New York State courts with respect to the State Constitution derived from the Supreme Court's opinion in *City of Renton v. Playtime Theaters, Inc.*, 106 S.Ct. 925 (1986), and were either identical to, or encompassed, the questions of constitutionality under the federal constitution, so that the New York State courts must be found to have implicitly upheld the constitutionality of the Amendment under the federal constitution. Plaintiffs contend that, in finding that the Amendment does not violate the Constitution of the State of New York, the New York courts did not necessarily adjudicate whether the Amendment violates the United States Constitution, The only issue before this panel is whether the stay should be extended pending resolution of the appeal.

We have found two questions arising on the appeal to be sufficiently troublesome to justify continuing the stay:

The first is whether generalized legal standards incorporated in New York law, deriving from the *Renton* opinion, such as the "substantiality" of the government interest served by the ordinance and the "reasonableness" of alternative avenues that remain for communication, necessarily have the same meaning in federal constitutional

law, so that the adjudication of the New York question necessarily answered the federal question.

The second question is whether the unavailability of Supreme Court review of the New York courts' determination of a question of New York State law should affect the appropriateness of collateral estoppel.

Accordingly, we hereby direct that the stay initially ordered by the district judge shall be extended through the hearing of the appeal, or until further order of this court. *See Cooper v. Town of East Hampton*, 83 F.3d. 31, 36 (2d Cir. 1996).

The appeal is hereby expedited. Appellants' briefs shall be filed by March 27, 1998. Appellees' brief shall be filed by April 8, 1998. Reply briefs by April 13, 1998. The case may be placed on the calendar for argument as early as April 27, 1998.

FOR THE COURT:

/s/ Lucille Carr

George Lange III, Clerk
By: Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL HICKERSON, *et al.*,

Plaintiffs,

– against –

THE CITY OF NEW YORK, *et al.*,

Defendants.

OPINION

96 Civ. 2203 (MGC)

AMSTERDAM VIDEO INC., *et al.*,

Plaintiffs,

– against –

THE CITY OF NEW YORK, *et al.*,

Defendants.

96 Civ. 2204 (MGC)

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CEDARBAUM, District Judge.

Plaintiffs in these two actions move for a temporary restraining order and preliminary injunction staying enforcement of Text Amendment N 950384 to the Zoning Resolution of the City of New York (the "Amended Zoning Resolution"), which regulates the zoning of "adult establishments."[1] The motion is denied for the reasons that follow.

In a case in which the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the issuance of a preliminary injunction requires the movant to demonstrate both irreparable harm and a likelihood of success on the merits. *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir.1995). This standard is particularly appropriate where a municipal regulation has been carefully examined by all of

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[1] Complete descriptions of the Amended Zoning Resolution can be found in this Court's prior opinion, *Hickerson v. City of New York*, 932 F.Supp. 550 (S.D.N.Y.1996), and in *Stringfellow's of New York, Ltd. v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (N.Y.Sup. 1996), *aff'd*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (1998).

the courts of the state, including the highest court, and its validity has been upheld under a state constitution that provides broad protection for individual rights.

A violation of the First Amendment of the Constitution of the United States is itself irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Accordingly, when an injunction is sought to protect First Amendment rights, likelihood of success on the merits and irreparable harm merge into a single threshold requirement. Preliminary injunctive relief is not warranted in this case because plaintiffs have not shown likelihood of success on the merits.

BACKGROUND

Plaintiffs in the Hickerson action are Manhattan and Bronx residents who allege that they regularly patronize adult establishments. They claim that the Amended Zoning Resolution will prevent them from continuing to patronize the adult establishments they currently frequent, and will reduce significantly the number of alternative establishments available to them. Plaintiffs in the Amsterdam action are owners and operators of business establishments which they allege are adult establishments as defined by the Amended Zoning Resolution. They allege that the resolution will force them to terminate the operation of their businesses and thereby cause them significant economic harm.

Both groups of plaintiffs originally sued in the Supreme Court for New York County, asserting claims of violation of freedom of expression under the New York Constitution and the Constitution of the United States. Defendants, the City of New York and three city officials, removed the actions to this Court because of the federal questions presented by the complaints. Plaintiffs promptly sought to return to the state court by moving to remand the actions in their entirety. On June 27, 1996, plaintiffs' motions to remand were granted in part and denied in part. Under the doctrine of abstention of

Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), all of plaintiffs' state claims were remanded to New York County Supreme Court, while the federal claims were stayed pending resolution of the state claims. *Hickerson v. City of New York*, 932 F.Supp. 550 (S.D.N.Y.1996).

State Court Proceedings

After remand of the state constitutional claims, defendants moved for summary judgment on those claims. Before defendants filed their summary judgment motion, plaintiffs conducted some discovery, including a deposition of Marilyn Mammano, a staff person at the Department of City Planning.

In support of summary judgment, defendants submitted a number of affidavits and virtually the entire legislative record of the Amended Zoning Resolution, including various studies and reports on adult businesses, the records of public hearings related to the Amended Zoning Resolution, and maps purporting to show permissible locations for the operation of adult establishments under the law. In opposition to the defendants' motion, plaintiffs submitted numerous affidavits and legal memoranda, including an extensive affidavit from a land use expert, R. Bruce McLaughlin. McLaughlin's affidavit addressed the availability of alternative sites for the businesses required by the Amended Zoning Resolution to close or relocate. It appears from McLaughlin's affidavit that he had been studying the matter for many months. According to the affidavit, McLaughlin personally visited every one of the more than 500 sites identified by the defendants as available for adult establishments. Moreover, documents attached to the affidavit included an analysis prepared in August 1995, while the Amended Zoning Resolution was under consideration and approximately one year before defendants moved for summary judgment.

On October 23, 1996, Justice Marylin G. Diamond of the New York County Supreme Court granted defendants' motion for summary judgment on plaintiffs' state constitutional claims. *Stringfellow's of New York, Ltd. v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (N.Y.Sup.1996), *aff'd*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (1998). Justice Diamond found that the Amended Zoning Resolution was not an attempt to regulate speech but rather was motivated by concerns other than those related to speech, and, in particular, by a reasonable belief that adult establishments produce undesirable secondary effects such as neighborhood deterioration, crime and decreased property values. Justice Diamond found that, in enacting the Amended Zoning Resolution, the City reasonably relied on a number of studies undertaken in New York City and elsewhere concerning the secondary effects of adult establishments. She also found that the Amended Zoning Resolution is no broader than is necessary to address the negative effects associated with adult establishments.

Finally, Justice Diamond found that the Amended Zoning Resolution provides ample space for adult establishments, leaving almost 4% of New York City's total land area available for use by such establishments. She stated that defendants had "more than sufficiently demonstrated that the permissible areas are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. While plaintiff's have labored mightily to create issues of fact, none exist." *Id.* 653 N.Y.S.2d at 814. This conclusion was based in part on the specific analysis provided in the affidavit of William Bernstein, First Deputy Executive Director of the Department of City Planning, and other affidavits submitted by the defendants, who represented that approximately 500 potential relocation sites existed in New York City. She also considered McLaughlin's affidavit, which concluded that the actual number of available alternative sites was much smaller than the 500 or so claimed by the defendants. Justice Diamond found that McLaughlin's

methodology was "fatally flawed" because it unjustifiably eliminated a number of sites based on factors that McLaughlin claimed make certain sites unavailable. *Id.* at 812. These factors included the undeveloped state of the proposed site, suitability for some "generic commercial enterprise," presence of a long-term lessee, current use as a parking lot and lease clauses prohibiting adult uses. Noting that such factors have been repeatedly rejected by state and federal courts, Justice Diamond found that McLaughlin and plaintiffs failed to rebut defendants' evidence that ample sites were available for the relocation of adult establishments. In so doing, she stated:

> Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP, he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.

Id. Justice Diamond rejected plaintiffs' contention that the defendants' estimate of 500 sites was invalid because it was generated by computer and not by inspection of the actual sites. She determined from the deposition testimony of Marilyn Mammano that the defendants' computation of alternative sites was properly calculated, based on conservative measurements, and, while not "site specific," was an acceptable estimate of the potential number of sites in the permissible areas. *Id.* at 812-813.

Finally, Justice Diamond rejected plaintiffs' request for additional discovery, because the administrative record before the court was "thorough, extensive and comprehensive." *Id.* at 813.

The decision of the New York County Supreme Court was unanimously affirmed by both the Appellate Division, 663 N.Y.S.2d 812 (1st Dep't 1997), and the New York Court of Appeals, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d

406 (1998). Holding that the state constitutional standards governing regulations such as the Amended Zoning. Resolution are substantially the same as the federal standards, the Court of Appeals relied on both state and federal authority to hold that the Amended Zoning Resolution had a purpose unrelated to speech, imposed restrictions no broader than necessary to implement the legitimate concerns of the legislature, and provided for reasonable alternative avenues of communication. Thus, after a thorough review of the record below, the Court of Appeals held that the resolution did not violate the state constitution and could be enforced by defendants. 694 N.E.2d at 420, 671 N.Y.S.2d at 419.

On February 26, 1998, plaintiffs returned to this Court seeking a temporary restraining order and a preliminary injunction against the enforcement of the Amended Zoning Resolution.

DISCUSSION

Defendants contend that the doctrine of collateral estoppel precludes plaintiffs from relitigating in this Court the same factual issues that have already been tried and decided in the state court. The preclusive effect of a state court determination in a subsequent federal proceeding is governed by the rules of the state in which the prior action was tried. 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *State of New York v. Sokol*, 113 F.3d 303, 306 (2d Cir.1997). Under New York law, a factual issue determined in a prior litigation is given preclusive effect if the issue to be precluded was necessarily decided in the prior litigation and the party opposing preclusion had a full and fair opportunity to litigate the issue. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823, 826, 467 N.E.2d 487 (1984); *Sokol*, 113 F.3d at 306. Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party ... and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v.*

Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Where factual determinations by a state court are at issue, collateral estoppel also "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96.

The First Amendment standard applicable to a content-neutral zoning ordinance regulating the location of adult entertainment businesses was established by the Supreme Court of the United States in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Under *Renton*, zoning ordinances of the kind at issue in these actions are content neutral time, place, and manner regulations if the legislative purpose is other than the restriction of speech. According to *Renton*, such a content neutral ordinance is permissible if it is "designed to serve a substantial governmental interest" and "allows for reasonable alternative avenues of communication." *Id.*, 475 U.S. at 50.

Each of the inquiries set out by the Supreme Court in *Renton* – the legislative purpose, whether the ordinance is designed to advance a substantial government interest, and the availability of reasonable alternative avenues of communication – is factual issue that has been litigated by plaintiffs and decided by the Supreme Court for New York County and affirmed by both the Appellate Division and the New York Court of Appeals. After extensive submissions by the parties, Justice Diamond held that (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Amended Zoning Resolution is "no broader than necessary" to prevent those adverse effects; and (4) defendants had "more than sufficiently demonstrated that the permissible areas" for adult establishments remaining in the City "are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate." 653 N.Y.S.2d at 803, 808, 809, 814.

Each of those inquiries was necessarily decided in the state court proceedings, and plaintiffs had a full and fair opportunity to litigate the issues in the state courts. Accordingly, if the doctrine applies, those issues are precluded from further litigation in this Court under the doctrine of collateral estoppel, now known as issue preclusion.

Plaintiffs offer no persuasive reason to be permitted to relitigate in this Court the very same issues they litigated in the state courts in order to persuade this Court to reach a different factual result. Plaintiffs contend that under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), they reserved their rights to relitigate these issues in federal court. The *England* case preserves a plaintiff's right to relitigate in federal court all issues related to the federal issues when the federal court is plaintiff's chosen forum, and plaintiff is forced, over its objection, to litigate those issues in state court because a federal judge sua sponte decides to abstain under *Pullman*. Here, however, plaintiffs' chosen forum was emphatically the state court. After plaintiffs filed these actions in state court, defendants removed them to this Court. Plaintiffs promptly moved to remand all their claims to the state court, and fought vigorously to return to their chosen forum, the state court. *England* does not govern or prohibit issue preclusion in these actions.

Plaintiffs also contend that they did not get a full and fair opportunity to litigate in state court. Under the New York law of issue preclusion, the party seeking preclusion has the burden of demonstrating the identity of the issues and that the issues were actually and necessarily decided in the prior litigation. The party opposing collateral estoppel has the burden of establishing the absence of a full and fair opportunity to litigate the issues in the prior action. *Sokol*, 113 F.3d at 306. A determination of whether a full and fair opportunity to litigate was provided requires consideration of the "realities" of the prior litigation. The factors to be considered include: (1) the nature of the forum and the

importance of the claim in the prior litigation; (2) the incentive to litigate and the actual extent of litigation; (3) the competence and experience of counsel; and (4) the foreseeability of future litigation. *Ryan*, 478 N.Y.S.2d at 827, 467 N.E.2d 487.

Plaintiffs complain that the actions were decided on summary judgment and after inadequate opportunity for discovery. Plaintiffs contend that their expert was not given adequate time to prepare his analysis of the purported alternative sites. Plaintiffs also argue that they were denied access to "critical information" such as how maps of permissible relocation areas were generated by the City. Finally, plaintiffs argue that they were not permitted to file a surreply after the City introduced new evidence and arguments on reply relating to the availability and suitability of potential sites.

The mere fact that a case is resolved on summary judgment and does not proceed to trial does not deny a party a full and fair opportunity to litigate. *See, e.g., Tobias v. First City National Bank and Trust Co.*, 709 F.Supp. 1266, 1270-1271 (S.D.N.Y.1989). Moreover, the "full and fair opportunity" requirement does not entitle a party to unlimited discovery. Indeed, state court proceedings permitting no discovery at all can be entitled to preclusive effect in federal court. *McBride v. Bratton*, 1996 WL 636075, at *3 (S.D.N.Y. November 4, 1996), *aff'd*, 122 F.3d 1056, 1997 WL 383521 (2d Cir.1997). It is undisputed that plaintiffs viewed the New York courts as the main forum and the New York Constitution as the principal basis for their extremely important effort to prevent New York City from requiring them to close and move their businesses. Plaintiffs were represented by experienced and highly competent counsel. They were permitted some discovery, and had a full opportunity to press any procedural grievances in addition to their substantive claims in the state courts.

Plaintiffs were permitted to take the deposition of Marilyn Mammano, designated by defendants as the staff

person familiar with the calculation made by defendants with respect to available alternative sites. Plaintiffs complain that Ms. Mammano was repeatedly directed not to answer questions, including questions related to the methodology of calculating the number of alternative sites and the suitability of alternative sites. Plaintiffs also complain that their requests for documents on these topics – those reviewed by Ms. Mammano before the deposition, and other documents – were denied. On the other hand, plaintiffs themselves point to a great deal of information from the Mammano deposition that they used to support their position in the state court, including testimony relating to the degree of defendant's investigation of alternative sites.

The New York courts themselves addressed plaintiffs' demands for discovery. Justice Diamond noted that plaintiffs' expert had zoning maps for 10 months before he made his submission in opposition to defendants' motion for summary judgment, and that with those maps, he could have estimated the acreage size of the permissible zones. Nevertheless, he failed to calculate the number of potential relocation sites under his methodology. She also expressly addressed plaintiffs' claim that additional discovery was needed, "in view of the present administrative record that this court finds to be thorough, extensive and comprehensive." 653 N.Y.S.2d at 813. Moreover, the New York Court of Appeals noted that before issuing a decision, the New York County Supreme Court ordered defendants to respond to interrogatories served by the Hickerson plaintiffs, to provide maps of alternative sites that eliminated encumbered areas, and to produce Ms. Mammano for deposition. The record before Justice Diamond totaled more than 10,000 pages, including pleadings, affidavits, exhibits and briefs. 671 N.Y.S.2d at 412, 694 N.E.2d at 413.

In sum, plaintiffs have not shown that they did not have a full and fair opportunity to litigate ably and vigorously in the state courts the very factual issues that are dispositive of their claim under the First Amendment. Accordingly, the factual findings of the New York County Supreme Court as affirmed

by the Appellate Division and the Court of Appeals are entitled to preclusive effect.

It should be noted that the zoning resolution attacked in this case under the First Amendment is before the Second Circuit in the case of *Buzzetti v. City of New York*, 1997 WL 164284 (S.D.N.Y. April 8, 1997). That case has been argued before the Second Circuit and is pending decision in that court.

This order denying a preliminary injunction is stayed until the close of court business on Monday, March 9, 1998 so that plaintiffs can promptly seek from the Second Circuit a stay pending appeal.

SO ORDERED.

Dated: New York, New York
March 6, 1998

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

STATE OF NEW YORK
COURT OF APPEALS

STRINGFELLOW'S OF NEW YORK, LTD.,

Appellant,

v.

THE CITY OF NEW YORK, et al.,

Respondents,

TIMES SQUARE BUSINESS
IMPROVEMENT DISTRICT, et al.,

Intervenors-Respondents.

AMSTERDAM VIDEO INC., et al.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Respondents,

TIMES SQUARE BUSINESS
IMPROVEMENT DISTRICT, et al.,

Intervenors-Respondents.

RACHEL HICKERSON, et al.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Respondents,

TIMES SQUARE BUSINESS
IMPROVEMENT DISTRICT, et al.,

Intervenors- Respondents.

Mark J. Alonso, P.C., New York City (Mark J. Alonso and Anna E. Bornstein, of counsel), for appellant in the first above-entitled action.

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York City (Herald Price Fahringer and Erica T. Dubno, of counsel), for appellants in the second above-entitled action.

Arthur Eisenberg, Norman Siegel and Beth Haroules, New York City, for appellants in the third above-entitled action.

Jeffrey D. Friedlander, Acting Corporation Counsel of New York City (Leonard Koerner, Albert G. Fredericks and Elizabeth S. Natrella, New York City, of counsel), for respondents in the first, second and third above-entitled actions.

Cravath, Swaine & Moore, New York City (Frederick A.O. Schwarz, Jr. and Justin J. Daniels, of counsel), for Times Square Business Improvement District, intervenor-respondent in the first, second and third above-entitled actions.

Dewey Ballantine, L.L.P., New York City (Wayne A. Cross and Heather K. McDevitt, of counsel), Dennis J. Saffran and Brian M. Stettin, for Center for the Community Interest and others, intervenors-respondents in the first, second and third above-entitled actions.

Morrison & Foerster, L.L.P., New York City (Michelle N. Kim, of counsel), for Association of the Bar of the City of New York, *amicus curiae* in the first, second and third above-entitled actions.

Zane and Rudofsky, New York City (Edward S. Rudofsky, Martin P. Mehler, Charles F. Axelrod and Arlene H. Schechter, of counsel), for Council of Regulated Adult Liquor Licensees, *amicus curiae* in the second above-entitled action.

Berkman, Gordon, Murray & De Van, Cleveland, OH (J. Michael Murray, of the Ohio Bar, admitted *pro hac vice*, of

counsel), for First Amendment Lawyers Association, amicus curiae in the second and third above-entitled actions.

OPINION OF THE COURT

TITONE, Judge.

This appeal concerns the validity of New York City's Amended Zoning Resolution governing the location of adult entertainment establishments throughout the five boroughs. We conclude that on this record the Supreme Court correctly granted summary judgment declaring that the challenged ordinance does not violate plaintiffs' constitutional rights of free expression.

I. Factual Background

The "adult" establishments at the center of this controversy offer various forms of sexual expression. These businesses include bookstores, theaters, stores dealing in videotaped material and places of live entertainment. In 1965, there were only nine such establishments in New York City. That figure has fluctuated over the past 30 years, but the last decade has experienced a steady growth in the industry, with sections of Manhattan and Queens showing the greatest development. By 1993, there were 177 adult establishments operating in New York City: 107 in Manhattan, 44 in Queens, 15 in Brooklyn, eight in the Bronx and three in Staten Island.

In September of 1993, the Department of City Planning (DCP) undertook an evaluation of the impact of such property uses on urban life. Published in September 1994, the DCP study was divided into two parts. First, the DCP examined similar studies conducted in nine other localities: Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County,

North Carolina; and the State of Minnesota. The DCP found evidence in these reports that adult businesses often have such negative secondary impacts as increased crime rates, depreciated property values and deteriorated community character.

The DCP also sought to identify the specific adverse secondary effects caused by adult establishments in New York City itself. To accomplish that goal, the DCP both conducted its own independent analysis of six selected areas in the City and examined other earlier studies of the City's adult uses. Among the other materials examined were a 1977 report by the City Planning Commission (CPC); a 1983 Annual Report of the Mayor's Office of Midtown Enforcement; a 1993 study conducted by the Chelsea Action Coalition and Manhattan Community Board 4; testimony at an October 1993 public hearing before the Task Force on the Regulation of Sex-Related Businesses; an April 1994 Times Square Business Improvement District (TSBID) study; and a 1993 survey compiling media accounts and complaint correspondence to City agencies.

The DCP's independent study confirmed that the number of adult establishments in the City had increased considerably in recent years. The DCP further found that as adult uses proliferated, they tended to cluster. In Manhattan, for example, adult businesses were concentrated in central locations such as the Times Square area. In the other boroughs, such businesses lined major vehicular routes such as Queens Boulevard in Queens and Third Avenue in Brooklyn. Additionally, the vast majority of adult establishments were located in zoning districts that permitted residential development.

Based on the material before it, the DCP determined that there were significant adverse impacts attributable to adult enterprises in the City, including downward pressure on property values and increased crime rate in areas where adult uses are most concentrated. A pivotal finding of the DCP was that a large majority of surveyed business and community

organizations believe that their neighborhoods are adversely affected by the presence of adult uses and that this perception itself leads to disinvestment and a marked decline in economic and pedestrian activity.

II. The Challenged Ordinance

The Zoning Resolution of the City of New York, adopted on December 15, 1960, regulates commercial establishments in the City. Historically, the Resolution did not distinguish between adult establishments and other commercial ventures. Like other businesses, adult enterprises simply had to satisfy the requirements for the particular "use group" into which they were classified. Consequently, adult uses were permitted in most of the City's commercial and manufacturing districts, which frequently also allowed residential development or were mapped close to residential districts.

Prompted by the findings and final recommendation of the DCP study that adult establishments should be regulated differently from other commercial establishments because of their unique negative effects, the CPC directed the DCP in November of 1994 to draft a set of adult-use zoning restrictions. Concomitantly, the City Council imposed a one-year moratorium on the creation or enlargement of adult-use establishments.

On March 21, 1995, the DCP and the City Council Land Use Committee jointly sought to amend the Zoning Resolution and establish a permanent and comprehensive set of regulations governing adult uses. Over the next several months, the City's 59 community boards, five borough boards and borough presidents, the CPC and the City Council reviewed the proposed amendments and conducted public hearings. On September 18, 1995, the CPC approved the proposed amendments, noting that they were "an appropriate and necessary response to the adverse secondary effects stemming from adult establishments" and that they nonetheless continue "to provide ample opportunity for adult-

establishments to locate and operate throughout New York City." After further public hearings and debate, the City Council gave final approval to Text Amendment N 950384 ZRY on October 25, 1995.

As adopted by the City Council, the amendments are applicable to any "adult establishment," defined as those commercial enterprises in which a "substantial portion" of the premises are used as an "adult book store," an "adult eating or drinking establishment," an "adult theater" or "other adult commercial establishment" (Amended Zoning Resolution § 12-10). Covered facilities are those within the foregoing four categories that "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities" (id.). "Adult eating or drinking establishments," "adult theaters" and "other adult commercial establishments" are covered only if they exclude minors because of their age (*id.*).

The amendments to the zoning code include an array of site limitations and anticlustering provisions. Under provisions that predate the amendments, new commercial establishments, including new adult establishments, are barred from the City's residential zones. Under the amendments, adult establishments, new and old, are now also barred from certain districts that are zoned for manufacturing and commercial use but also permit residential development. The regulated uses are permitted in all other manufacturing districts and in all high-density, general commercial districts (Amended Zoning Resolution § 32-01 [a]; § 42-01[a]).

Within those districts where adult uses are authorized, the adult establishment must be located at least 500 feet from schools, houses of worship, day care centers, other adult uses and zoning districts where new residential development is allowed (Amended Zoning Resolution § 32-01[b]; § 42-01[b]). In addition, no more than one adult establishment may be located on a single zoning lot, and these

establishments cannot exceed 10,000 square feet of usable floor area and cellar space (Amended Zoning Resolution § 32-01 [d], [e]; § 42-01[d], [e]). The amendments also impose restraints on the size, placement and illumination of accessory business signs (Amended Zoning Resolution §§ 32-69, 42-55).

Any adult establishment operating in a prohibited location must either conform or terminate its business within one year of the amendments' effective date (Amended Zoning Resolution §§ 52-77, 52-734). An exception to this termination requirement is available for existing businesses which are noncompliant only because (1) their area exceeds 10,000 square feet, (2) they are located on a zoning lot with another adult use, or (3) they are situated less than 500 feet from another adult establishment (Amended Zoning Resolution § 32-01[f]; § 42-01[f]). Another narrow exception is made for otherwise conforming adult uses that fall out of compliance because of the subsequent siting of a school or house of worship within 500 feet of their boundaries (Amended Zoning Resolution § 32-01[b]; § 42-01[b]). Lastly, adult establishments faced with the one-year termination deadline can apply for an extension to the Board of Standards and Appeals, which may permit the applicant to remain open for a limited time to amortize any substantial and unrecovered costs associated with the adult portion of the establishment (Amended Zoning Resolution § 72-40).

III. Procedural History

On February 27, 1996, the *Amsterdam Video* plaintiffs, consisting of more than 100 owners and operators of adult establishments in the City, and the *Hickerson* plaintiffs, consisting of four patrons of such establishments, commenced actions in Supreme Court, New York County, against the City and related officials. Plaintiffs alleged that the Amended Zoning Resolution deprived them of their right to free expression protected by article I, § 8 of the New York State Constitution and the First Amendment to the United

States Constitution. Plaintiffs sought relief in the form of a judgment declaring the zoning amendments unconstitutional and enjoining their enforcement.

Defendants removed the case to the United States District Court for the Southern District of New York, but on plaintiffs' application the court remanded plaintiffs' causes of action grounded in the State Constitution, retaining jurisdiction over the Federal claims (932 F.Supp. 550). Subsequently, Stringfellow's, a cabaret featuring topless dancers, separately challenged the constitutionality of the amendments and sought injunctive relief. Supreme Court then granted the intervention motions of TSBID, the Center for Community Interest, and 45 other community groups, business organizations and local elected officials and consolidated the actions for hearing.

On August 26, 1996, defendants moved for summary judgment. The *Amsterdam Video* and *Stringfellow's* plaintiffs cross-moved for summary judgment; the *Hickerson* plaintiffs opposed defendants' motions but declined to cross-move for summary judgment on the theory that the case involved material factual disputes warranting a trial. Before issuing its decision, Supreme Court ordered additional discovery, in particular directing defendants to answer interrogatories served by the *Hickerson* plaintiffs, to provide maps to demonstrate the areas where adult uses would be permitted when encumbered areas were eliminated, and to produce for a deposition a person familiar with the DCP's calculation of the total number of alternative sites that would be available to relocated adult establishments under the amendments. A voluminous record of pleadings, affidavits, exhibits and briefs totaling more than 10,000 pages was before the court on the various summary judgment motions.

On October 23, 1996, Supreme Court granted defendants' motions for summary judgment and declared that "the Amended Zoning Resolution does not violate plaintiffs' rights of freedom of expression guaranteed under the State Constitution, and is, therefore, constitutional" (171 Misc.2d

376, 397, 653 N.Y.S.2d 801). Applying the test articulated by this Court in *Matter of Town of Islip v. Caviglia*, 73 N.Y.2d 544, 558-559, 542 N.Y.S.2d 139, 540 N.E.2d 215, Supreme Court first concluded that the amendments were content neutral. The court found in the City's planning studies sufficient evidence of adverse secondary effects to support use of its zoning authority to address a serious neighborhood problem. Additionally, the court held that the amendments were no broader than necessary to achieve their stated purpose, with zoning being the most appropriate response to address existing and anticipated future problems. Further, in the court's view, defendants had sufficiently demonstrated that the number of potential relocation sites under the Amended Zoning Resolution was more than adequate to accommodate the existing number of businesses. Plaintiffs' claim of a lack of available alternative sites, in contrast, was speculative and rested on discredited theories. Thus, the court concluded, no issues of material fact existed requiring a trial. The Appellate Division unanimously affirmed (241 A.D.2d 360, 663 N.Y.S.2d 812) and plaintiffs took an appeal as of right pursuant to CPLR 5601(b)(1).[1]

IV. Analysis

This Court has long recognized the considerable authority of municipalities to implement zoning plans and programs to meet the increasing encroachments of urbanization on the quality of their residents' lives (*see, e.g., Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265; *Matter of Harbison v. City of Buffalo*, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42). Because they are legislative enactments, these land-use regulations

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[1] Enforcement of the Amended Zoning Resolution was stayed pursuant to an Appellate Division order dated October 24, 1996 and a subsequent agreement among the parties. On September 23, 1997, this Court denied defendants' request for a vacatur of the stay (90 N.Y.2d 933, 664 N.Y.S.2d 266, 686 N.E.2d 1362).

generally enjoy a strong presumption of con-stitutionality as valid exercises of the State's police power to advance the public health, safety and welfare (*see, McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548-549, 498 N.Y.S.2d 128, 488 N.E.2d 1240; *Udell v. Haas*, 21 N.Y.2d 463, 469-470, 288 N.Y.S.2d 888, 235 N.E.2d 897). Thus, even if the validity of a provision is "fairly debatable," the municipality's judgment as to its necessity must control (*Matter of Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 186, 351 N.Y.S.2d 129, 306 N.E.2d 155).

Municipal zoning authority is not, however, completely unfettered. Ordinances such as the one challenged here that aim to curb "adult" uses implicate speech or conduct that is protected by the First Amendment (*see, e.g., Schad v. Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2180-2181, 68 L.Ed.2d 671; *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-2615, 37 L.Ed.2d 419; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503, 72 S.Ct. 777, 780-781, 96 L.Ed. 1098) and by article I, § 8 of the New York State Constitution.[2] Consequently, in weighing the validity of such zoning regulations, courts must consider the intertwined constitutional values of free expression.

In this State, the proper balance between community needs and free expression under our Constitution has been delineated in *Matter of Town of Islip v. Caviglia*, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215, *supra*. At issue in *Islip* was a zoning ordinance that confined adult uses to industrially zoned areas and prohibited them from locating within 500 feet of a number of certain sensitive receptors or within one-half mile of each other. The ordinance had been prompted by studies of conditions locally and elsewhere which demonstrated the harmful impact of adult businesses on the surrounding community. We concluded that the

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[2] Article I, § 8 provides in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

ordinance satisfied both Federal constitutional standards (*see, Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29) and the distinct protections afforded by our State Constitution. In so ruling, the Court considered whether the "predominant purpose" of the challenged ordinance was to ameliorate the negative secondary effects of adult uses rather than to suppress their content, whether the ordinance was "narrowly tailored to affect only those uses shown to produce the unwanted secondary effects" and whether it provided adequate alternative locations for adult businesses within the Town (73 N.Y.2d, at 552-555, 542 N.Y.S.2d 139, 540 N.E.2d 215, citing *Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, *supra*; *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310). With respect to the State constitutional claims in *Islip*, the Court considered whether the Town's ordinance was "justified by concerns unrelated to speech," whether it was "no broader than needed to achieve its purpose" under the State constitutional principles set forth in *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492, and, finally, whether "if the ordinance [were] enforced the total number of adult bookstores w[ould] decline or * * * fewer potential customers w[ould] be able to conveniently patronize them" (73 N.Y.2d, at 557-560, 542 N.Y.S.2d 139, 540 N.E.2d 215). It is against the template of *Islip*, that we measure plaintiffs' claims in these cases.

A. The Ordinance's Purpose Is Unrelated to Speech

The threshold issue here is whether the City's zoning amendments are purposefully directed at controlling the content of the message conveyed through adult businesses or are instead aimed at an entirely separate societal goal. The Federal constitutional analysis requires examination of the ordinance's "predominant purpose" (*see, Renton v. Playtime Theatres, supra*), while the State constitutional inquiry focuses on whether there has been "a purposeful attempt to regulate speech" (Matter of *Town of Islip v. Caviglia, supra*, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). In the context of these facts, however, the difference in verbiage does not

significantly affect the outcome, since it is apparent from the amendments' legislative history that ameliorating the negative social consequences of proliferating adult uses was the City's *only* goal.

Before enacting the Resolution, the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City. One of these studies, prepared by the TSBID, focused on the impact of adult uses on property values and the incidence of crime in the Times Square area, in the heart of Manhattan. The TSBID identified four study blocks (those containing at least one adult enterprise) and four neighboring control blocks (those with no sex-related establishments), and then compared those data with similar statistics for the District as a whole, the wider Times Square area, all of Manhattan, and all of New York City. The data included crime statistics, property valuations and 53 formal interviews with business and real estate enterprises.

The study concluded that "the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks along Ninth Avenue. To a lesser extent, the rate of increase of the actual total assessed value of the 42nd Street Study Block is less than that of the 42nd Street Control Block." It also determined that "[w]ithin the study blocks, non-adult businesses with adult establishments nearby showed a deflated rate of property value growth, compared to the adult establishments themselves which increased in value at a higher rate." Similarly, the underlying data showed a correlation between a concentration of adult establishments and increased crime. Over the five years preceding the study, for example, police statistics showed that there was an estimated 54% decrease in crime in the Times Square area, a decrease which was paralleled by a decrease in adult establishments. The study also found significant "patterns," notably that there were many more criminal complaints on

the study blocks than the control blocks and that the heaviest incidence of prostitution arrests occurred in the three block study area of dense concentration of adult establishments.

The Chelsea Action Coalition and Manhattan Community Board 4 prepared a second study of the effects that sex-related businesses have on other businesses in the Chelsea section of Manhattan. The study incorporated a survey of 100 Chelsea businesses located near triple-X video stores and peep shows in the neighborhood. A majority of those surveyed indicated that adult uses had a negative impact on their businesses and on the economic viability of the community as a whole.

The DCP independently surveyed six study and control areas—two in Manhattan, and one in each of the remaining boroughs. More than 80% of the real estate brokers responding to the survey reported that an adult establishment tends to depress the market value of property within 500 feet; similarly, community organizations overwhelmingly reported their perceptions that adult businesses negatively affect the community. Although the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area.

Finally, the City additionally reviewed conclusions reached by city councils and town boards throughout the country. A 1984 study conducted for the City of Indianapolis, for example, found higher crime rates in areas containing at least one adult establishment than in similar areas without adult uses. The Indianapolis study included a nationwide survey of real estate appraisers. A large majority of the appraisers indicated that, in their professional opinions, an adult bookstore would have a negative effect on the value of both residential and commercial properties located within a

one block radius of the store. Still another example was a 1997 Los Angeles study that included a survey of real estate professionals and businesses. The survey indicated that a concentration of adult establishments adversely affected the value of surrounding commercial and residential property, made it more difficult to rent office space and retain commercial tenants in the area, and made it harder for area businesses to attract and retain customers.

In view of the legislative record upon which the City Council rested its decision to regulate adult uses, we agree with the courts below that enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose (*see, Matter of Town of Islip v. Caviglia, supra*). Plaintiffs' reliance on isolated comments from several City Council members and other City officials as evidence of an alleged improper motive to eradicate this form of expression is unavailing. A similar claim was rejected in *Islip*, where we recognized that courts will not "invalidate a municipal zoning ordinance simply because one or more legislators sought to suppress protected expression * * *. [I]t is the motive of the Legislature, not individual legislators, that is controlling" (*id.*, at 552, n. 2, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Nor is it significant that definitions of adult uses in the Amended Zoning Resolution are based in part on the content of the entertainment offered rather than exclusively on the age of the businesses' clientele (*cf., Matter of Town of Islip v. Caviglia, supra*, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). The test under both *Islip* and *Renton* is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content (73 N.Y.2d, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215, 475 U.S. at 44, 47-50, 106 S.Ct. at 927, 928-930; *see also, Young v. American Mini Theatres, supra*, at 52-54, 70-71, 96 S.Ct. at 2443-2445, 2452-2453 [plurality opn]). That test is plainly met here.

Plaintiffs' complaints about the sufficiency of the evidence on which the City Council based its decision are unpersuasive. In *Islip*, we explicitly acknowledged the value of studies from other jurisdictions (73 N.Y.2d, at 550, 553, 542 N.Y.S.2d 139, 540 N.E.2d 215). Further, it is clear from the comments of the CPC upon its approval of the amendments that the appropriate municipal officials considered the comparability and the reliability of the other jurisdictions' studies and found them satisfactory on both counts. As the CPC noted, "while none of the other studies considers a municipality which duplicates New York City in terms of variety of neighborhoods and built conditions, * * * the findings of adverse secondary effects and the conditions found in these other studies are relevant to the different neighborhoods of New York City." Plaintiffs have not offered any factual or legal basis to question that finding.

Moreover, the City did not rely exclusively on generic conclusions drawn from out-of-area studies but also conducted studies of its own. Contrary to plaintiffs' contentions, the "non-empirical," anecdotal evidence that comprised the bulk of the local studies does not render those studies worthless. In the proper context, anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects (*see, e.g., Renton v. Playtime Theatres*, 475 U.S., at 44, 106 S.Ct. at 927, *supra*; *ILQ Invs. v. City of Rochester*, 25 F.3d 1413, 1416-1417 [8th Cir.], *cert. denied* 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493), particularly where, as here, the nonempirical information is extensive and indicative of a clear relationship between adult uses and urban decay.

B. The Amendments Are No Broader Than Necessary

Based upon an extensive analysis of the impacts of such establishments in the City, the amendments represent a coherent regulatory scheme designed to attack the problems associated with adult establishments. By preventing adult businesses from locating in potential residential districts

while allowing such establishments to locate in manufacturing and commercial districts, the amendments protect only those communities and community institutions that are most vulnerable to their adverse impacts.

It is now well recognized that municipalities can constitutionally bar adult establishments from, or within, a specified distance of residentially zoned areas and facilities in which families and children congregate (*see, Renton v. Playtime Theatres, supra,* at 44, 106 S.Ct. at 927; *Young v. American Mini Theatres, supra,* at 52, 96 S.Ct. at 2443-2444; *Matter of Town of Islip v. Caviglia, supra,* at 549, 563, 542 N.Y.S.2d 139, 540 N.E.2d 215). Moreover, zoning ordinances may be used to prohibit an adult business from operating within a specified distance of another in order to avoid the undesirable impacts associated with the clustering (*see, Young v. American Mini Theatres, supra,* at 52, 96 S.Ct. at 2443-2444; *Matter of Town of Islip v. Caviglia, supra,* at 563, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Relying on our State constitutional standard (*see, People ex rel. Arcara v. Cloud Books, supra,* at 558, 510 N.Y.S.2d 844, 503 N.E.2d 492), plaintiffs insist that defendants should have pursued less restrictive methods of addressing the problems caused by adult uses, such as more aggressive enforcement of existing penal and public nuisance laws, developing targeted signage requirements and limiting adult-use zoning restrictions to new establishments. However, the record here shows that the City Council reasonably determined that the listed alternatives would not adequately address problems it sought to ameliorate.

According to its report approving the proposed amendments, the CPC concluded that restricting only new adult uses "would have the effect of freezing certain locations and certain neighborhoods as the situs of adult establishments," making the reversal of existing adult-use-related blight impossible. The CPC also looked at the possibility of sign regulations, but found, based on the studies before it, that such a narrow approach would not

suffice to address such ills as reduced property values, economic stagnation, heightened crime and change in neighborhood character. As to the efficacy of more aggressive law enforcement measures, the CPC hearings revealed that such measures are generally only partially successful in stemming the criminal activity that often surrounds adult establishments.

Contrary to plaintiff's assertions in *Stringfellow's*, the City was not obligated on this record to distinguish among different types of adult uses based on the social class of their clientele or the nature of the adult entertainment they provide. Indeed, such distinctions may well have themselves run afoul of constitutional prohibitions (*see, id.*, at 558, 510 N.Y.S.2d 844, 503 N.E.2d 492). Significantly, the CPC itself found that "all of the adult uses which would be covered by the proposed regulations have been shown to produce adverse secondary effects * * *. Nothing in the studies or in the public testimony justifies distinctive treatment of any adult use." To the extent that certain individual establishments may legitimately claim that their facilities do not contribute to urban blight, their argument does not impair the constitutionality of the challenged legislation, since "[t]he validity of a statute * * * is not to be determined from its effect in a particular case, but upon its general purpose and its effect to that end" (*City of Rochester v. Gutberlett*, 211 N.Y. 309, 316, 105 N.E. 548; *see also, ILQ Invs. v. City of Rochester, supra*, at 1418).

C. Reasonable Alternative Avenues of Communication

To satisfy constitutional requirements, the City additionally must assure reasonable alternative avenues of communication (*see, Renton v. Playtime Theatres, supra*, at 53-54, 106 S.Ct. at 931-932). As this Court stated in *Islip*, there must be (1) "ample space available for adult uses after the rezoning" and (2) no showing by the challenger that enforcement of the ordinance will either substantially reduce the total number of adult outlets or significantly reduce the

accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Relying on a formula derived from *Renton v. Playtime Theatres (supra)*, the Federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads" (*id.*, at 53, 106 S.Ct. at 932). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (*see, Renton v. Playtime Theatres, supra*, at 53, 106 S.Ct. at 931-932; *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-1125 (5th Cir. 1995), *cert. denied* 516 U.S. 988, 116 S.Ct. 516, 133 L.Ed.2d 425; *Grand Brittain v. City of Amarillo*, 27 F.3d 1068, 1070 (5th Cir.1994); *see also, Matter of Town of Islip v. Caviglia, supra*, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215 [areas of a municipality set aside for adult uses need not be prime locations]). Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (*see, Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1530-1531 (9th Cir.1993), *cert. denied* 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190; *see also, Woodall v. City of El Paso, supra*; *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir.1991)).

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see*, 989 F.2d, at 1531). Notably, these considerations dovetail nicely with *Islip's* requirement that

there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Plaintiffs assert, and the municipal defendants do not dispute, that the amendments' enforcement will lead to the forced relocation of some 84% of the City's 177 adult businesses. Given the extent of the dislocation, it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available. The City has asserted that the space available for adult uses constitutes over 11% of the City's total land area and about 4% when reduced by land encumbered by properties that are unlikely to be developed for commercial use. They further assert, based on maps prepared by City officials, that the amended zoning code leaves at least 500 potential sites for adult establishments to relocate and operate.

According to the City's submissions, the amendments will allow adult businesses to remain in districts that permit a wide mix of commercial, retail, entertainment and manufacturing uses. All of the areas in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs are within a 10-minute walk from a subway line or a major bus route. These supported allegations by the City satisfy its initial burden of showing that the space designated for adult uses is adequate to accommodate the 177 existing adult businesses.

Plaintiffs, in challenging defendants' proof, rely heavily on an affidavit by Robert McLaughlin, a land-use planning and local government consultant who actually visited the sites the City identified as potential receptors. McLaughlin alleged that many of the sites are in truth unavailable because they currently house long-term occupants such as governmental and public utility facilities that are unlikely to yield to

new tenants of any sort. Other sites, according to McLaughlin, lack the necessary infrastructure or lie on wetland property that is not suitable for commercial development. Overall, McLaughlin concluded, the City's zoning plan does not allow for adequate alternative avenues for adult expression.

The McLaughlin affidavit, however, is not sufficient to raise a triable question of fact as to the availability of enough potential receptor sites. First, the affidavit's utility is undercut by McLaughlin's reliance on several assumptions that are inconsistent with controlling legal principles. McLaughlin, for example, took the position that "industrial areas" are generally unsuitable for generic commercial uses. In *Islip*, however, this Court specifically approved a local zoning ordinance that restricted adult uses to an industrial zone (73 N.Y.2d, at 548, 555, 542 N.Y.S.2d 139, 540 N.E.2d 215; *accord, Renton v. Playtime Theatres, supra*, at 53, 106 S.Ct. at 931-932). Similarly, McLaughlin eliminated undeveloped land, waterfront property, warehouse areas and parking lots as unsuitable receptors, although both this Court and the *Renton* Court expressly recognized such areas as potentially available relocation sites.

The most significant flaw in McLaughlin's affidavit, however, is the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable. To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage

as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Even if the criticized sites are eliminated, the absence of any quantification in the McLaughlin affidavit makes it impossible to determine whether what remains of the 500 identified sites is insufficient to accommodate the 177 adult businesses that will have to relocate once the amendments are implemented. For example, despite McLaughlin's observations that several tracts within the nonresidential zone along the far west side of Manhattan are physically or pragmatically unavailable, his affidavit does not contain the hard factual data necessary to establish that, with the elimination of these sites and with due consideration of the dispersal requirement, the City's claim that Manhattan will accommodate some 75 adult uses represents a significant overestimation. Given this shortfall, the accuracy of the City's overall calculations was not called into serious question. Similarly, the McLaughlin affidavit did not provide a basis for inferring that the result of the new zoning controls would "restrict in any significant way those wishing to [patronize adult establishments]" (*Matter of Town of Islip v. Caviglia, supra*, at 554, 542 N.Y.S.2d 139, 540 N.E.2d 215). Thus, the McLaughlin affidavit is speculative and presents no impediment to summary judgment (*see, Romano v. Stanley*, 90 N.Y.2d 444, 451-452, 661 N.Y.S.2d 589, 684 N.E.2d 19).

D. Plaintiffs' Remaining Claims

The *Amsterdam Video* and *Stringfellow's* plaintiffs argue that the amendments' enforcement will lead to an unconstitutional taking because much of the substantial investments they have made in their businesses will be lost if they are required to relocate. They further contend that the one-year amortization provision in the ordinance (Zoning Resolution §§ 52-734, 52-77) is too short to give them an opportunity to recoup their investments. These arguments are unpersuasive, however, because they fail to take into account the effect of the statutory provisions for hardship extensions. Under these provisions, a nonconforming adult establishment

may apply to the Board of Standards and Appeals for permission to continue to operate beyond the one-year amortization period set forth in the statute where it can show that it has made substantial expenditures related to the non-conformity, that such expenditures cannot be recouped within a year and that the requested extension is the minimum necessary to permit such recoupment (Zoning Resolution § 72-40). Having failed to seek relief under this provision, plaintiffs are not now in a position to complain that their constitutional due process rights have been violated (*see, Matter of Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 525 N.Y.S.2d 176, 519 N.E.2d 1372, *cert. denied* 488 U.S. 801, 109 S.Ct. 30, 102 L.Ed.2d 9; *Town of Islip v. Zalak*, 165 A.D.2d 83, 95, 566 N.Y.S.2d 306).

Equally unavailing is plaintiff's contention that the amendments are unconstitutionally vague. As a threshold matter, the *Hickerson* plaintiffs, purportedly patrons of adult establishments, lack standing to assert these claims because the amendments do not directly regulate their conduct (*see generally, Matter of Axelrod v. Sobol*, 78 N.Y.2d 112, 115, 571 N.Y.S.2d 902, 575 N.E.2d 388). With respect to the *Amsterdam Video* and *Stringfellow's* plaintiffs' vagueness claims, it should suffice to observe that the amendments' definitional provisions are sufficiently specific to provide the public with clear and reasonable notice of the type of businesses that are covered. Indeed, the Federal courts have already upheld similar zoning provisions that regulate commercial facilities devoting a "substantial portion" of their businesses to adult entertainment (*see, e.g., ILQ Invs. v. City of Rochester*, 25 F.3d 1413 (8th Cir.1994), *cert. denied* 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493, *supra*).

Finally, we are not persuaded by the *Stringfellow's* plaintiff's discrete argument that the ordinance's distance requirements are too vague because they do not include a statement indicating the precise standard for measurement. To the extent that this aspect of the ordinance's provisions leaves room for confusion, the problem is procedurally remediable through administrative application and rule

making. Notably, there is no indication on the present record that the City's enforcement of the distance rules will be arbitrary or uneven.

V. Conclusion

The City's effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the standards set forth by the United States Supreme Court in *Renton v. Playtime Theatres (supra)* or by this Court in *Matter of Town of Islip v. Caviglia (supra)*. Accordingly, in each case the order of the Appellate Division should be affirmed, with costs.

Order affirmed, with costs.

Opinion by Judge Titone. Judges Bellacosa, Smith, Levine, Ciparick and Wesley concur. Chief Judge Kaye took no part.

Decided February 24, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL HICKERSON, *et al.*,

Plaintiffs,

– against –

THE CITY OF NEW YORK, *et al.*,

Defendants.

OPINION

Nos. 96 Civ. 2203 (MGC)

AMSTERDAM VIDEO INC., *et al.*,

Plaintiffs,

– against –

THE CITY OF NEW YORK, *et al.*,

Defendants.

96 Civ. 2204 (MGC)

Appearances:

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Gabriel Taussig,
Assistant Corporation Counsel

CEDARBAUM, Judge.

Plaintiffs in these two actions challenge the constitutionality of a recent amendment to the New York City zoning resolution which regulates the zoning of "adult establishments." Defendants, the City of New York and three City officials, removed the actions to this Court because the complaints assert claims under the United States Constitution as well as the New York State Constitution. Plaintiffs move to remand the actions, including the federal constitutional claims, to the state court. For the reasons that follow, these cases warrant abstention under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Accordingly, all of the claims arising under the New York Constitution are remanded to the Supreme Court of New York County. Remand of the federal claims is denied but the federal claims are stayed pending resolution of the state claims.

Background

The New York City Council adopted Text Amendment N 950384 ZRY (the "resolution") to the city zoning resolution on October 25, 1995. The resolution adds to the zoning resolution special provisions applicable to "adult establishments." It defines an adult establishment as "a commercial establishment where a 'substantial portion' of the establishment includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof." Resolution § 12-10. (The resolution is attached to the *Amsterdam* complaint and also is Exhibit A to the Declaration of Albert Fredericks dated May 16, 1996.) Adult bookstores are defined as bookstores that have as a "substantial portion" of their stock-in-trade books, magazines, photographs, films, video cassettes, or other printed matter or visual representations that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified

anatomical areas.'" *Id.* § 12-10(a). An adult eating or drinking establishment is an eating or drinking establishment that "regularly features" either live performances that are "characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities'"; films or other photographic reproductions that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas'"; or "employees who, as part of their employment, regularly expose to patrons 'specified anatomical areas'"; and "which is not customarily open to the general public during such features because it excludes minors by reason of age." *Id.* § 12-10(b). An adult theater is a theater that "regularly features" films or other similar photographic reproductions that are "characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas'" or live performances that are "characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities,'" and "which is not customarily open to the general public during such features because it excludes minors by reason of age." *Id.* § 12-10(c). Other adult commercial establishments are facilities that "feature[ ] employees who as part of their employment, regularly expose to patrons 'specified anatomical areas' and which is not customarily open to the general public during such features because it excludes minors by reason of age." § 12-10(d).

The resolution defines "specified sexual activities" and "specified anatomical areas." *Id.* § 12-10. It does not define "substantial portion" as that term is used in the definition of adult establishment and adult bookstore, but provides that

> for the purpose of determining whether a "substantial portion" of an establishment includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or combination thereof, the following factors shall be considered: (1) the amount of floor area and cellar space accessible to customers and

> allocated to such uses; and (2) the amount of floor area and cellar space accessible to customers and allocated to such uses as compared to the total floor area and cellar space accessible to customers in the establishment.

Id. With respect to the definition of adult bookstores the resolution provides:

> For the purpose of determining whether a bookstore has a "substantial portion" of its stock in materials defined in paragraphs (a)(1) or (a)(2) hereof, the following factors shall be considered: (1) the amount of such stock accessible to customers as compared to the total stock accessible to customers in the establishment; and (2) the amount of floor area and cellar space accessible to customers containing such stock; and (3) the amount of floor area and cellar space accessible to customers containing such stock as compared to the total floor area and cellar space accessible to customers in the establishment.

Id. The resolution does not define the phrases "regularly features" or "characterized by an emphasis," which are used in the definitions of adult eating and drinking establishment and adult theater.

The resolution provides that adult establishments are not permitted in various zoning districts, including residential districts and some commercial and manufacturing districts. *Id.* §§ 32-01; 42-01; Fredericks Decl. ¶ 8. It provides further that adult establishments must be located at least 500 feet from a church or school or another adult establishment. Resolution §§ 32-01(b) & (c); 42-01(b) & (c). Under the resolution, one adult establishment only is permitted on a single zoning lot and no adult establishment is permitted to exceed 10,000 square feet in floor area and cellar space. *Id.* §§ 32-01(d) & (e); 42-01(d) & (e). The resolution also includes special sign regulations for adult establishments. *Id.* §§ 32-69; 42-55.

Non-conforming adult establishments must, under the resolution, terminate within one year of the effective date of the resolution. *Id.* § 52-77. The resolution includes special "amortization" provisions, however, for owners of non-conforming establishments who have not recovered substantially all of their capital investment in the establishment (or non-conforming sign). Such owners may apply to the Board of Standards and Appeals for permission to continue for additional time sufficient for the owner to recover "substantially all of the financial expenditures incurred related to the non-conformity." *Id.* § 72-40.

The resolution became effective on November 1, 1995, less than one year ago. Accordingly, no establishment has yet been required to close or move because of its provisions. Moreover, the resolution has not been construed by any court.

Plaintiffs in the first action (the "*Hickerson* plaintiffs") are Manhattan and Bronx residents who allege that they regularly patronize adult establishments. They claim that the resolution will prevent them from continuing to patronize the adult establishments they currently frequent, and will reduce significantly the number of alternative establishments available to them. The *Hickerson* plaintiffs contend that the resolution violates their rights to free expression. They assert three claims under article I section 8 of the New York Constitution and three claims under the First and Fourteenth Amendments to the United States Constitution. As their first cause of action, plaintiffs allege that the resolution intentionally restricts expression because it is directed at the "content and the time, place and manner of the messages conveyed in 'adult businesses,'" and that it is not necessary to advance a compelling interest and does not advance an interest in the least restrictive manner. (*Hickerson* Compl. ¶¶ 72-73.) As their second cause of action, the *Hickerson* plaintiffs claim that the resolution "fails to restrict expression by means 'no broader than necessary' to achieve a legitimate and important governmental objective." (*Id.* ¶ 77.) As a third cause of action plaintiffs allege that the resolution violates

article I section 8 of the New York Constitution in that it is too vague. (*Id.* ¶¶ 79-83.) As a fourth cause of action, plaintiffs assert that the resolution violates the First Amendment to the United States Constitution by failing to satisfy the requirements of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). (*Id.* ¶¶ 84-90.) As a fifth cause of action, the complaint alleges that the resolution is a content-based restriction that is not narrowly tailored to serve a compelling government interest, in violation of the First Amendment. (*Id.* ¶¶ 91-94.) Finally, as a sixth cause of action, the complaint alleges that the resolution violates the First and Fourteenth Amendments because it is too vague. (*Id.* ¶¶ 95-99.)

Plaintiffs in the second action (the "*Amsterdam* plaintiffs") are owners and operators of business establishments which they allege are adult establishments as defined by the resolution. They allege that the resolution will force them to terminate the operation of their businesses and thereby cause them significant economic harm. The *Amsterdam* plaintiffs assert fourteen causes of action, thirteen of which allege violations of the state constitution. Four causes of action elaborate different aspects of plaintiffs' claim that the resolution violates their rights to free expression under article I section 8. (*Amsterdam* Compl. ¶¶ 143-238.) Five causes of action assert that the resolution denies plaintiffs equal protection of the law in violation of article I section 11. (*Id.* ¶¶ 239-54, 274-92, 312-17.) The *Amsterdam* plaintiffs also assert two causes of action alleging that the resolution is unconstitutionally vague, (*id.* ¶¶ 270-73, 293-311), one cause of action alleging that the resolution grants an impermissible preference in favor of religion in violation of article I section 3, (*id.* ¶¶ 255-69), and one cause of action alleging that the amortization provisions of the resolution are inadequate and constitute an unconstitutional taking without just compensation in violation of article I section 7, (*id.* ¶¶ 318-31). As a fourteenth cause of action the *Amsterdam* complaint alleges that the resolution violates

plaintiffs' rights to free speech and to equal protection of the law in violation of the First and Fourteenth Amendments to the United States Constitution. (*Id.* ¶¶ 332-43.)

Plaintiffs in both cases seek declaratory and injunctive relief. The *Hickerson* plaintiffs request in addition costs and attorneys' fees.

Pullman Abstention

Abstention is an extraordinary and narrow exception to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817, 96 S.Ct. 1236, 1244, 1246, 47 L.Ed.2d 483 (1976) (citations omitted); *see also Quackenbush v. Allstate Ins. Co.*, – U.S. –, – , 116 S.Ct. 1712, 1721, 135 L.Ed.2d 1 (1996). Abstention is warranted only in "exceptional circumstances" in which the court's decision not to exercise its jurisdiction would "clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 (quoting County of *Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)). Federal courts are also obligated, however, to avoid deciding a federal constitutional question unless decision is "absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J. concurring). Of particular relevance here is the well-settled rule that a case should be decided first on state law grounds in order to eliminate the need to decide a federal constitutional question. *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 29 S.Ct. 451, 53 L.Ed. 753 (1909).

In *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the plaintiffs challenged an order of the Texas Railroad Commission requiring railroad sleeping cars to be staffed by a person with the rank of Pullman conductor. All Pullman conductors were white,

and all Pullman porters were African-American. Until the challenged order, Pullman porters were in charge of sleeping cars on trains carrying only one such car. The Pullman Company and the railroads argued in federal court that the order violated Texas law and the Equal Protection, Due Process, and Commerce Clauses of the United States Constitution. Pullman porters intervened and claimed that the order unconstitutionally discriminated against them. The district court found in the plaintiffs' favor and enjoined enforcement of the order. *Id.* at 497-98, 61 S.Ct. at 644.

The Supreme Court reversed, holding that the district court should have stayed its hand until the Texas courts had ruled on the state law question. The Court explained that the porters' federal claim raised a "more than substantial" constitutional question, which the federal courts ought to avoid unless "no alternative to its adjudication is open." *Id.* at 498, 61 S.Ct. at 644. The Court then examined the Commission's power to issue the order under Texas law, and found that because the governing law was "far from clear," a decision by a federal court could not "escape being a forecast rather than a determination." *Id.* at 499, 61 S.Ct. at 645. A ruling by a federal court would amount to only a "tentative decision" which could be "displaced tomorrow by a state adjudication." *Id.* at 500, 61 S.Ct. at 645. Emphasizing that the plaintiffs appealed to the equitable powers of the federal court, the Court invoked the obligation of a court sitting in equity to exercise sound discretion in employing equitable remedies. It noted that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." *Id.* In view of the important policies of avoiding both constitutional questions and undue interference with state governments, the Court held that abstention from the constitutional claim was required, and remanded the case to the district court with instructions to stay the action pending proceedings in the state court to determine the validity of the order under state law. *Id.* at 501-502, 61 S.Ct. at 645-646.

Under *Pullman*, "abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244 (quoting *County of Allegheny*, 360 U.S. at 189, 79 S.Ct. at 1063 (internal quotation marks omitted)). The relevant state law must be unclear to warrant abstention. *E.g. Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); *Reetz v. Bozanich*, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); *Pullman*. Abstention is not required in every case in which a plaintiff raises claims under both the federal constitution and "parallel state constitutional provisions." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 n. 4, 104 S.Ct. 2321, 2327 n. 4, 81 L.Ed.2d 186 (1984). The Supreme Court has ordered abstention in several cases, however, in which a ruling by a state court as to whether the challenged statute violated the relevant state constitution could avoid the need for the determination of a federal constitutional question. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975); *Reetz*; *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed.2d 562 (1959) (per curiam); *see also Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971) (per curiam) (remanding for consideration of abstention under *Pullman* abstention principles explained in *Reetz* where plaintiffs alleged that Florida statute violated federal constitution and another action pending in state court challenged same statute under state constitution).

Plaintiffs' principal challenge to the resolution is their claim that the resolution violates their rights of free expression. The New York Court of Appeals has held that the New York Constitution protects rights to free expression that the First Amendment does not protect. *See People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986). Article I section 8 provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of

that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." This language is different from that of the First Amendment, which provides: "Congress shall make no law ... abridging the freedom of speech, or of the press...." Plaintiffs raise substantial claims under the state constitution. These state constitutional claims should be determined before plaintiffs' claims under the federal constitution, because a ruling that the resolution violates the state constitution would obviate the need to decide the federal constitutional questions. *See Pullman; Ashwander; Siler.*

The state constitutional claims present questions whose resolution is "far from clear." Although the New York Court of Appeals decided in *Town of Islip v. Caviglia* that a zoning ordinance adopted by the Town of Islip to regulate adult establishments did not violate article I section 8, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215 (1989), it is uncertain how a New York court would apply that case to the resolution challenged here. The Islip ordinance governed bookstores, drive-in theaters, motels, theaters, and "peep shows" that were "not open to the public generally but exclude[d] any minor by reason of age." 73 N.Y.2d at 562-63, 542 N.Y.S.2d at 149, 540 N.E.2d at 225. Only the definitions of "adult entertainment cabaret" (which encompassed any "public or private establishment which present[ed] topless dancers, strippers, male or female impersonators or exotic dancers, or other similar entertainments and which establishment [was] customarily not open to the public generally but exclude[d] any minor by reason of age") and "massage establishment" made any reference to the subject matter of the books, films, or other materials stocked or "featured" by the adult establishment. By contrast, the resolution defines all of the affected establishments by reference to whether their wares or live performances or the activities of their employees emphasize "specified sexual activities" or "specified anatomical areas." In *Caviglia*, the Court of Appeals found that the ordinance did not require forty-three percent of adult establishments in

the community to move, and that the town rezoned some land to permit an adult bookstore to remain at its pre-ordinance location. Plaintiffs in these cases allege that the resolution will require more than eighty-four percent of existing adult establishments to move or close. The court found in *Caviglia* that substantial space in Islip was available for adult establishments, but plaintiffs here contend that insufficient alternative space is available for the large number of adult establishments in New York City. Because of these and other differences between the *Caviglia* case and these cases, the outcome of plaintiffs' state constitutional challenge is uncertain. As was true of the state law claims in *Pullman*, a federal court's judgment of the resolution's constitutionality under the state constitution would be a mere forecast rather than a determination. These claims should be decided by the state courts before any federal constitutional issue is reached.

Defendants argue that abstention is unwarranted because the federal constitutional claims do not logically depend on the state constitutional claims. (Def. Mem. at 14.) But the federal claims in *Pullman* also did not depend on the state law claim raised there. Abstention is appropriate because plaintiffs have brought claims under a provision of the state constitution that differs from the provision of the federal constitution on which they rely, the state constitutional law is not settled, and resolution of the claims under the state constitution may avoid the need for a determination of the federal constitutional questions.

In addition, plaintiffs' claims that the resolution is unconstitutionally vague depend on interpretation of a new resolution that has not been construed by any court. The meaning of phrases in the resolution such as "substantial portion" and "regularly feature" are not at once apparent. A federal court should not be the first to construe these provisions. Abstention is warranted to give the New York courts an opportunity to construe the resolution, for the courts could interpret these phrases in such a way as to change or eliminate the vagueness claims. *Greater New York*

Metro. Food Council v. McGuire, 6 F.3d 75 (2d Cir.1993) (per curiam).

For all of these reasons, these cases present exceptional circumstances which require abstention. The state claims are remanded to state court, and the federal claims are stayed until conclusion of the state litigation.

Burford Abstention, Remand, and Supplemental Jurisdiction

As explained above, plaintiffs' state constitutional claims are remanded and the federal claims stayed. Plaintiffs, however, want more. They seek to have their federal constitutional claims adjudicated by a state court. Plaintiffs argue that the doctrine of *Burford* abstention and 28 U.S.C. § 1441(c) both authorize remand of the claims arising under the Constitution of the United States. In addition, the *Amsterdam* plaintiffs suggest that remand is authorized by 28 U.S.C. § 1367.

Only extraordinary circumstances justify a federal court's refusal to decide claims that fall within its original jurisdiction. The court's responsibility to exercise jurisdiction is especially strong when, as here, substantial claims under the federal constitution are presented. Plaintiffs argue that this obligation is limited to the duty to protect a plaintiff's right to have federal constitutional claims adjudicated by a federal court. Plaintiffs reject defendants' correlative right to a federal forum.

Plaintiffs are the masters of their complaints, and these plaintiffs could have assured themselves a state forum by bringing only claims arising under state law. Plaintiffs are, of course, entitled to raise any claim for which they have a good faith basis. But if plaintiffs choose to assert claims under the constitution of the United States, defendants are entitled to remove the case to federal court. 28 U.S.C. § 1441(a) (1994).

The City of New York and its officials are entitled to have their responsibilities under the federal constitution determined by a federal court. Although I have held that exceptional circumstances are present which justify staying the federal claims until the state courts have decided the state constitutional claims, the circumstances that would justify a decision entirely to relinquish the federal claims do not exist. That is, the circumstances justify delaying decision on the federal claims, but not complete abdication. For the reasons explained below, the authority on which plaintiffs rely does not provide a basis for remand of the federal constitutional claims.

1. Burford Abstention

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), the Supreme Court held that the district court, as a matter of sound equitable discretion, should have declined to exercise jurisdiction over the plaintiff's due process challenge to an order of the Texas Railroad Commission. The Commission's order, which granted the defendant the right to drill certain oil wells, was issued pursuant to a statute empowering the Commission to regulate oil production in Texas. Because of the detailed, comprehensive regulatory scheme involved, the Court held that the district court should have abstained. The Court noted that if federal courts were available for review of the Commission's orders, "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy" would inevitably result, *id.* at 327, 63 S.Ct. at 1104, and that oil production involved "basic problems of Texas policy," *id.* at 332, 63 S.Ct. at 1106. The Court described the Texas courts as "working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." *Id.* at 326, 63 S.Ct. at 1103. The Court concluded that such challenges should be left to the state courts to be handled as "one more item in a continuous series of adjustments." *Id.* at 332, 63 S.Ct. at 1106 (citation omitted).

The Court has since described the doctrine of *Burford* abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361, 109 S.Ct. 2506, 2514, 105 L.Ed.2d 298 (1989) (quoting *Colorado River*). The Second Circuit has held that "the aim of *Burford* abstention is to avoid resolving difficult state law issues involving important public policies or avoid interfering with state efforts to maintain a coherent policy in an area of comprehensive regulation or administration." *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1243 (2d Cir.1992) (citations and internal quotation marks omitted).

Plaintiffs argue that *Burford* abstention is warranted because "the question of zoning needs is an issue of local land use policy and, therefore, is more properly considered in the first instance by the state court." (*Hickerson* Pls.Mem. at 7, *Amsterdam* Pls.Mem. at 19 (quoting *Rose v. Village of Upper Nyack*, 669 F.Supp. 654, 656 (S.D.N.Y.1987)).) Plaintiffs contend that decision by a federal court would disrupt the City's efforts to establish a coherent zoning scheme for adult establishments.

Burford abstention cannot be justified in the cases before the Court. They are not challenges to discrete orders under a comprehensive regulatory scheme as in *Burford*. If decision of the federal constitutional claims becomes necessary, a federal court will not be required to resolve difficult

questions of state law, because plaintiffs attack an entire scheme under the Constitution and the state courts will have already construed the resolution. Decision by a federal court also would not disrupt the City's efforts to establish a coherent policy. Indeed, it would make little sense to hold that federal court adjudication would unduly interfere with local policy when it is the local government defendants who brought the case to federal court, and who seek to keep it here. *Burford* abstention is not appropriate.

2. Remand – 28 U.S.C. § 1441(c)

Plaintiffs contend that 28 U.S.C. § 1441(c) authorizes remand of these actions in their entireties, including the federal claims. Section 1441(c) was amended in 1990 by the Judicial Improvements Act. Prior to its amendment, this section provided:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1988). The provision now reads as follows:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c) (1994).

Plaintiffs rely on the last clause of the amended provision, which now authorizes remand of all "matters" in which state law predominates. Plaintiffs contend that Congress changed the language to permit district courts to remand an entire case that includes a federal claim when state law predominates in the case as a whole.

Plaintiffs' argument is not persuasive. First, section 1441(c) does not apply to these cases because plaintiffs' federal claims are not "separate and independent" from their state law claims. Prior to 1990, the Supreme Court held that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951). The Court observed in *Carnegie-Mellon University v. Cohill* that federal claims are not separate and independent from pendent claims such as plaintiffs' state constitutional claims. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 354, 108 S.Ct. 614, 621, 98 L.Ed.2d 720 (1988). Congress left this "separate and independent" language unchanged when it amended the statute, and therefore the provision continues to be inapplicable to cases comprised of federal question claims and pendent state claims. *Borough of West Mifflin v. Lancaster*, 45 F.3d 780 (3d Cir.1995).

Second, even in those cases to which it applies, section 1441(c) does not authorize remand of federal claims. The sparse legislative history relating to the phrase on which plaintiffs rely provides little guidance except that it contains no indication of an intention to effect a radical change in federal question jurisdiction. It is not clear what Congress meant by "matters in which State law predominates." Congress was aware, however, of the federal courts' strong view of their obligation to exercise jurisdiction over federal claims properly before them, and it is extremely unlikely that Congress would have used such ambiguous language to accomplish so significant a change in federal jurisdiction. Some district court decisions, on which plaintiffs rely, have

concluded that the revised provision does authorize remand of entire cases including federal claims. *Moralez v. Meat Cutters Local 539*, 778 F.Supp. 368 (E.D.Mich.1991); Alexander by *Alexander v. Goldome Credit Corp.*, 772 F.Supp. 1217 (M.D.Ala.1991); *Moore v. DeBiase*, 766 F.Supp. 1311 (D.N.J.1991); *Holland v. World Omni Leasing*, 764 F.Supp. 1442 (N.D.Ala.1991); *Martin v. Drummond Coal Co.*, 756 F.Supp. 524 (N.D.Ala.1991). The better view, however, is that it does not. *See Buchner v. Federal Deposit Ins. Corp.*, 981 F.2d 816 (5th Cir.1993); *Kabealo v. Davis*, 829 F.Supp. 923 (S.D.Ohio 1993), *aff'd*, 72 F.3d 129 (6th Cir.1995). History, language, and logic compel the conclusion that under section 1441(c), the phrase "matters in which State law predominates" does not encompass federal claims.

Finally, even if I had discretion under this statute to remand plaintiffs' federal constitutional claims, I would not do so. Plaintiffs have raised claims under the First Amendment; their allegations that the resolution also violates the state constitution do not diminish the importance of the federal constitutional issues. A "matter" that includes a substantial federal constitutional claim cannot be a matter in which state law predominates.

3. Supplemental Jurisdiction – 28 U.S.C. § 1367

The *Amsterdam* plaintiffs appear to contend that 28 U.S.C. § 1367 authorizes remand of the federal as well as the state law claims in these actions. Also enacted as part of the Judicial Improvements Act of 1990, section 1367 codifies the doctrines of pendent and ancillary jurisdiction, now called "supplemental" jurisdiction. Subsection (a) of the statute provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such

> original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (1994). Subsection (c) provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a)" under certain circumstances. § 1367(c). Nothing in section 1367 authorizes a district court to dismiss or remand any claim over which the district court has original jurisdiction, including claims arising under the United States Constitution.

For all of the reasons stated above, plaintiffs' motions to remand the claims arising under the United States Constitution are denied.

Motions for Intervention

Forty-eight individuals and organizations move to intervene as defendants in these actions. In light of my decision to abstain, the motions for intervention are denied as premature, subject to renewal when these cases are reopened following the conclusion of the state proceedings and without prejudice to motions for intervention in the state proceedings.

Conclusion

For the foregoing reasons, the motions to remand are granted in part and denied in part. All claims arising under the Constitution of New York are remanded to the Supreme Court of New York County. All claims arising under the Constitution of the United States are stayed pending determination of the state claims in state court. The motions for intervention are denied without prejudice.

SO ORDERED.

Dated: New York, New York
June 27, 1996

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

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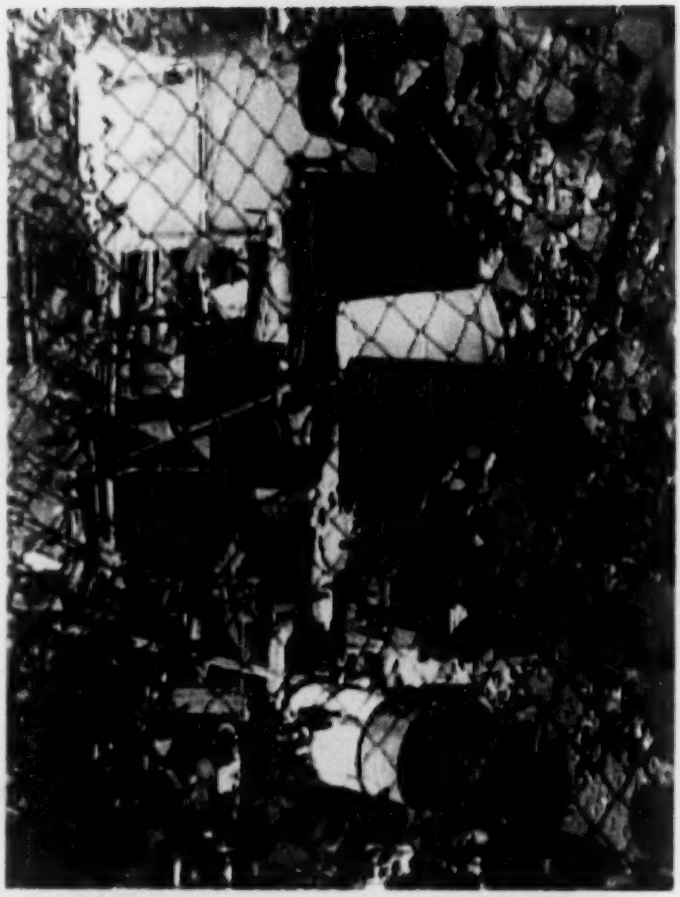

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